U.S. Customs and Border Protection

Slip Op. 11–125

PEER BEARING COMPANY-CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and CHANGSHAN PEER BEARING CO. LTD. AND PEER BEARING COMPANY Defendant-Intervenors, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 11–00022

[Denying the motion of defendant-intervenors Changshan Peer Bearing Co. Ltd. and Peer Bearing Company to dismiss a claim in the complaint filed by The Timken Company]

Dated: October 13, 2011

John M. Gurley, *Diana Dimitriuc Quaia*, and *Matthew L. Kanna*, Arent Fox LLP, of Washington, DC, for plaintiff and defendant-intervenor Peer Bearing Company - Changshan.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Herbert C. Shelley and *Christopher G. Falcone*, Steptoe & Johnson LLP, of Washington, DC, for defendant-intervenors Changshan Peer Bearing Co. Ltd. and Peer Bearing Company.

William A. Fennell and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor The Timken Company. With them on the brief was *Nazak Nikakhtar*, of Washington, DC.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Peer Bearing Company - Changshan ("CPZ"), the plaintiff in Court No. 11–00022, and The Timken Company ("Timken"), the plaintiff in Court No. 11–00039, challenge the final results that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the twenty-second administrative review of the antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the

People's Republic of China. *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086 (Jan. 19, 2011) ("*Final Results*"); Compl. (Feb. 2, 2011), ECF No. 6; Compl. (Mar. 10, 2011), ECF No. 9 (Court No. 11–00039) ("Timken's Compl."). The twenty-second review pertained to the period of June 1, 2008 to May 31, 2009 (the "period of review" or "POR"). *Final Results*, 76 Fed. Reg. at 3,086. The court consolidated the two cases under Consolidated Court No. 11–00022 on June 13, 2011. Order (June 13, 2011), ECF No. 27.

Before the court is the motion of two companies that are affiliates of AB SKF ("SKF") and are defendant-intervenors in this case, Changshan Peer Bearing Co. Ltd. and Peer Bearing Company, to dismiss one of the two claims in Timken's complaint for failure to state a claim upon which relief can be granted. Def.-intervenors' Mot. to Dismiss 1 ("Mot. to Dismiss") (citing USCIT R. 12(b)(5)). The two SKF affiliates argue that Timken's second claim should be dismissed in response to Timken' failure to exhaust administrative remedies. *Id.* For the reasons discussed below, the court denies the motion to dismiss.

Timken alleges in its complaint that during the period of review CPZ produced subject TRBs and sold them through Peer, which at that time was CPZ's U.S. sales affiliate, that also during the POR (specifically, on September 11, 2008), SKF purchased the corporate shares, assets, and liabilities of CPZ and Peer, and that thereafter CPZ and Peer ceased to operate and the SKF affiliates began production and sales of subject TRBs. Timken's Compl. ¶ 8. Timken alleges that among the assets transferred in the SKF acquisition was an inventory of subject TRBs that Peer had imported but not yet sold. *Id.* ¶ 10. On these alleged facts, Timken claims, first, that Commerce erred in regarding the subsequent sales of these TRBs by an SKF affiliate to unaffiliated customers as the first U.S. sales for purposes of determining U.S. price under section 772 of the Tariff Act of 1930, 19 U.S.C. § 1677a (2006). Timken's Compl. ¶¶ 10–11. Timken argues that Commerce instead should have recognized the acquisition of the inventory as the first U.S. sales. *Id.* ¶ 11. Second, Timken claims that Commerce erred in determining the normal value of those same TRBs. Specifically, Timken argues that because CPZ had produced the merchandise at issue, Commerce was required to determine normal value according to CPZ's factors of production rather than according to factors of production that an SKF affiliate submitted, which factors, according to Timken, pertained to production of TRBs by the SKF affiliate after the acquisition. *Id.* ¶¶ 13–16.

The SKF affiliates argue that the court should dismiss Timken's second claim, asserting that Timken failed to raise its objection to the normal value determination in the case brief it filed before the Department. Mot. to Dismiss 4–5. They rely on section 301 of the Customs Courts Act of 1980, which directs that the court, "where appropriate, shall require the exhaustion of administrative remedies." *Id.* (citing 28 U.S.C. § 2637(d) (2006)). They support their motion to dismiss Timken's second claim with several documents from the administrative record. *Id.* exhibits 1–6.

A motion under USCIT Rule 12(b)(5) requires the court to determine whether a complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). In ruling on such a motion, the court may not rely on matters presented outside of the pleadings, USCIT R. 12(d), but may consider documents incorporated into the complaint, exhibits attached to the complaint, or matters of which the court may take judicial notice, *see*, *e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

The pleadings and other matters that the court may consider in ruling on the motion to dismiss do not establish to a certainty that Timken will be unable to obtain relief on its second claim. The court has discretion whether to deny relief for failure to exhaust administrative remedies, *see* 28 U.S.C. § 2637(d), and may consider whether an exception to the doctrine of exhaustion of administrative remedies applies on the particular facts.[1] Although the movants appended to their motion several documents that purport to resolve the exhaustion issue, with one exception the court may not consider such materials in ruling on a motion to dismiss. These documents neither are attached to Timken's complaint nor are matters of public record of which the court may take judicial notice. *See* Mot. to Dismiss exhibit 1 (the Department's preliminary margin determination memorandum); *id.* exhibit 2 (Timken's case brief before Commerce regarding SKF); *id.* exhibit 3 (Timken's case brief before Commerce regarding CPZ); *id.* exhibit 4 (Timken's rebuttal case brief before Commerce

[1] Recognized exceptions to exhaustion requirement include: (1) argument based on pure question of law, (2) lack of timely access to the confidential record, (3) judicial decision rendered subsequent to the administrative determination materially affecting the issue, or (4) futility. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT __, __, 601 F. Supp. 2d 1370, 1377 (2009).

regarding CPZ); *id.* exhibit 5 (Timken's ministerial error comments); *id.* exhibit 6 (the Department's ministerial error response). The court may consider one of these documents, Timken's case brief before Commerce regarding SKF, because Timken incorporated this document by reference in its complaint. Timken's Compl. ¶ 11. This document, however, does not resolve the entire exhaustion question; for example, record evidence might be relevant to the court's determining whether an exception to the exhaustion doctrine would apply. In these circumstances, the court does not consider it appropriate to decide the exhaustion issue without resort to the administrative record and, therefore, will deny the motion to dismiss the second claim in Timken's complaint.

ORDER

Upon review of the Defendant-intervenors' Motion to Dismiss, as filed by Changshan Peer Bearing Co. Ltd. and Peer Bearing Company on April 13, 2011 ("Motion to Dismiss"), and upon due consideration of all filings made in this consolidated case, it is hereby

ORDERED that the Motion to Dismiss be, and hereby is, DENIED.

Dated: October 13, 2011
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

Slip Op. 11–126

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF GMBH, AND SKF INDUSTRIE S.P.A., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 07–00393

[Remanding the decision of the U.S. Department of Commerce for further explanation]

Dated: October 14, 2011

Herbert C. Shelley, *Alice A. Kipel*, and *Laura R. Ardito*, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs.

Claudia Burke, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Gregory G. Katsas*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Mykhaylo A. Gryzlov*, *Deborah R. King*, and *Jonathan Zielinski*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011). CAFC Mandate in Appeal # 2010–1128 (Mar. 29, 2011), ECF No. 75. This case affirmed in part and vacated in part the judgment of the United States Court of International Trade ("CIT") in *SKF USA Inc. v. United States*, 33 CIT __, 659 F. Supp. 2d 1338 (2009), in which the CIT affirmed the final determination ("Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Oct. 12, 2007).

The Court of Appeals, agreeing with plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A. (collectively, "SKF" or "plaintiffs") and rejecting the CIT's affirmance of the Final Results, held that Commerce had failed to provide an adequate explanation for its decision to modify its practice for calculating the constructed normal value of subject merchandise that the exporter purchased from an unaffiliated supplier. *SKF USA*, 630 F.3d at 1373–74 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). During the antidumping investigation and the first sixteen administrative reviews, Commerce constructed the normal value of subject merchandise using the exporter's acquisition costs. *Id.* at 1368–69. During the seventeenth administrative review, the review at issue in this case, Commerce constructed normal value using the unaffiliated supplier's costs of production. *Id.* at 1369–70.

The Court of Appeals considered inadequate the Department's explanation of the change in practice, concluding that Commerce failed to confront "two significant concerns raised by SKF." *Id.* at 1374. Those concerns were, first, that under the new method an exporter "could not change its pricing to avoid dumping because it would have no knowledge of its unaffiliated supplier's actual production costs."

Id. ("Commerce did not address SKF's concern that it could not control its pricing to avoid dumping in its Issues and Decision Memorandum or explain why this concern was unjustified or why it was outweighed by other considerations."). The second concern was that Commerce potentially would "apply an adverse inference if the unaffiliated supplier failed to provide cost data." *Id.* ("Use of adverse inferences may be unfair considering SKF has no control over its unaffiliated supplier's actions. . . . Commerce must explain why SKF's concern is unwarranted or is outweighed by other considerations."); *see* Tariff Act of 1930, § 782, 19 U.S.C. § 1677e(b) (2006) (governing use of adverse inferences). The Court of Appeals observed that Commerce decided to draw an adverse inference on analogous facts in the subsequent review and that the CIT had held that decision to be unlawful. *SKF USA*, 630 F.3d at 1374–75 & n.6.

Because the Court of Appeals grounded its reversal of the CIT in the inadequacy of the Department's explanation of the change in practice, rather than disallow the change in practice *per se*, the court orders a remand under which Commerce must reconsider its decision and address, at a minimum, the two significant concerns raised by plaintiffs.

ORDER

In response to the decision and mandate issued by the Court of Appeals in *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011), it is hereby

ORDERED that, on remand, Commerce shall reconsider its decision in *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Oct. 12, 2007) to construct the normal value for entries of subject merchandise produced by a supplier unaffiliated to the exporter using the supplier's costs of production rather than the exporter's acquisition costs; it is further

ORDERED that Commerce shall provide an explanation for any decision that it reaches upon reconsidering its previous decision and shall include in that explanation, at a minimum, an analysis responding to the two significant concerns raised by plaintiffs that were identified by the Court of Appeals in *SKF USA*, 630 F.3d at 1373–75; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within sixty (60) days from the date of this Opinion and Order, and that defendant and defendant-intervenor shall have thirty (30) days from the date on which that redetermination is filed with the court to file comments thereon.

Dated: October 14, 2011
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

Slip Op. 11–127

AISIN HOLDINGS OF AMERICA, INC., CATERPILLAR INC., MAZAK CORPORATION, MAZDA MOTOR OF AMERICA, INC., GENERAL MOTORS COMPANY, NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, NTN BOWER CORPORATION, NTN DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN-BCA CORPORATION, AST BEARINGS LLC, AND SPB USA LLC, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 11–00126

[Plaintiffs' petition for a writ of mandamus is denied.]

Dated: October 14, 2011

Crowell & Moring, LLP (*Alexander Hume Schaefer*, *Daniel J. Cannistra*, *Hea Jin Koh*, and *John Bowers Brew*), for plaintiffs Aisin Holdings of America, Inc., Caterpillar Inc., Mazak Corporation, Mazda Motor of America, Inc., and consolidated plaintiff General Motors Company.

Baker & McKenzie, LLP (*Kevin Michael O'Brien*, *Christine M. Streatfeild*, and *Diane Alexa MacDonald*) for consolidated plaintiffs NTN Corporation, NTN Bearing Corporation of America, NTN Bower Corporation, NTN Driveshaft, Inc., American NTN Bearing Manufacturing Corp., and NTN-BCA Corporation.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Andrew Brehm Schroth*) for consolidated plaintiffs AST Bearings LLC and SPB USA LLC.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, *Michael D. Panzera*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Amy Suzanne Dwyer*, *Eric Peter Salonen*, *Lane Steven Hurewitz*, *Patrick John McDonough*, *Philip Andrew Butler*, *Stephanie Rose Manaker*, and *Terence Patrick Stewart*) for defendant-intervenor The Timken Company.

OPINION & ORDER

BARZILAY, Senior Judge:

I. Introduction

Plaintiffs in this consolidated action seek a writ of mandamus ordering the U.S. Department of Commerce ("Commerce") to (1) revoke antidumping duty orders covering ball bearings from Japan and the United Kingdom; (2) direct U.S. Customs and Border Protection ("Customs") to liquidate entries of ball bearings made after July 11, 2005, and (3) order Customs to end the suspension of liquidation of ongoing entries. Am. Compl. 10. In their opposition to mandamus, Defendant has filed a cross-motion to dismiss Plaintiffs' claims under USCIT Rules 12(b)(1) and 12(b)(5). Def.'s Opp'n 1. For the reasons set forth below and discussed in *NSK Corp. v. United States*, Slip Op. 11–124, 2011 WL 4828498 (CIT Oct. 12, 2011) ("Slip Op. 11–124"), the court denies Plaintiffs' petition for a writ of mandamus.

II. Background

The court presumes familiarity with *NSK Corp. v. United States* (Consol. Court No. 0600334) ("*NSK*"), including the court's opinion in Slip Op. 11–124.

Plaintiffs are foreign exporters and domestic importers of ball bearings entered since July 11, 2005.[1] Am. Compl. 1, 7; Pl.'s Br. 1. Plaintiffs were not party to *NSK*. Plaintiffs' entries, however, remain subject to the underlying antidumping duty orders covering ball bearings from Japan and the United Kingdom. Am. Compl. 7. Liquidation of Plaintiffs' entries, like those of plaintiffs in *NSK*, is suspended pursuant to *Notice of Court Decision Not in Harmony With Continuation of Antidumping Duty Orders*, 76 Fed. Reg. 35,401 (Dep't of Commerce June 17, 2011) ("*Timken Notice*") and *Ball Bearings and Parts Thereof From Japan and the United Kingdom*, 76 Fed. Reg. 41,761 (Dep't of Commerce July 15, 2011) ("*Revocation Notice*"). Am. Compl. 3, 7. Plaintiffs filed the instant petition for a writ of mandamus seeking to enforce the court's judgment in *NSK*, which, according to Plaintiffs, requires Commerce to issue liquidation instructions that reflect the revocation (i.e., no duties). Pl.'s Br. 5–11.

III. Discussion

1. Subject Matter Jurisdiction

Plaintiffs assert jurisdiction pursuant to 28 U.S.C. § 1581(i). Am. Compl. 2; Pl.'s Reply 3–5. Defendant avers that this action constitutes, in essence, a challenge to the Commission's original (affirmative) determinations. Def.'s Opp'n 9–10. According to Defendant, Plaintiffs could have raised these claims under § 1581(c) and therefore cannot rely on the court's residual jurisdiction. Def.'s Opp'n 8–10.

A fundamental question in any action before the Court is whether

[1] July 11, 2005, is the five-year anniversary of the continuation of the antidumping duty orders on the subject merchandise.

subject matter jurisdiction exists over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The party invoking the Court's jurisdiction bears the burden of establishing it. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The Federal Circuit and this Court have repeatedly held that § 1581(i) confers jurisdiction over challenges to liquidation and revocation instructions. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05, 1309 (Fed. Cir. 2004) (finding § 1581(i) jurisdiction available for plaintiff "seeking a writ of mandamus ordering liquidation of its entries"); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002–03 (Fed. Cir. 2003); *Canadian Wheat Bd. v. United States*, 32 CIT __, ___, 580 F. Supp. 2d 1350, 1357–62 (2008). In such cases, § 1581(i) jurisdiction is available even for plaintiffs who did not challenge the determination for which the agency issued implementing instructions. *See Consol. Bearings Co.*, 348 F.3d at 1002.

Contrary to Defendant's assertion, Plaintiffs are not contesting the Commission's original (affirmative) determinations. Instead, Plaintiffs charge that Commerce did not properly administer the remand determinations when it purportedly failed to revoke the antidumping duty orders and to liquidate subject entries in the manner required by statute. Am. Compl. 7–10; Pl.'s Br. 5–11; Pl.'s Reply 3–4. Because this action concerns "administration and enforcement" of a final determination by the Commission, the court has jurisdiction pursuant to § 1581(i)(4).

2. Plaintiffs' Petition for a Writ of Mandamus

A writ of mandamus is an extraordinary remedy with three requirements: (1) defendant must owe plaintiff a clear, non-discretionary duty; (2) plaintiff must have no adequate alternative remedies, and (3) the court must be satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). For the same reasons outlined in Slip Op. 11–124, Plaintiffs fail to satisfy the elements of mandamus.

Plaintiffs argue that Commerce failed to act on three clear, non-discretionary duties after the Commission issued its negative remand determinations. Plaintiffs first claim that Commerce had a clear, non-discretionary duty under 19 U.S.C. § 1675(d)(2) to "actually revoke" the antidumping duty orders covering ball bearings from Japan and the United Kingdom. Pl.'s Br. 5–10. Plaintiffs also claim that Commerce had a clear, non-discretionary duty to instruct Customs to liquidate Plaintiffs' entries pursuant to the *Revocation Notice* (i.e., at a rate of zero). Pl.'s Br. 7–10. Finally, Plaintiffs contend that Commerce had a clear, non-discretionary duty to refund cash deposits made on Plaintiffs' entries after July 11, 2005. Pl.'s Br. 9; Pl.'s Reply 1–2, 9.

Plaintiffs' argument that Commerce has a clear duty under § 1675(d)(2) to "actually revoke" the orders is difficult to understand considering the facts of the case. Section 1675(d)(2) states that Commerce "shall revoke" an antidumping duty order if the Commission makes a negative determination. 19 U.S.C. § 1675(d)(2). On July 15, 2011, Commerce issued a notice that revoked the orders, ended the collection of cash deposits, and discontinued all administrative reviews. *Revocation Notice*, 76 Fed. Reg. at 41,762. Plaintiffs' sole complaint regarding the act of revocation is that Commerce is continuing to require that Plaintiffs' entries be labeled "Type 03" upon entry, indicating they are subject to antidumping duties.[2] Pl.'s Reply 2. Plaintiffs do not cite, however, any language in § 1675(d)(2) – nor in any other statute, case law, or regulation – that demonstrates that Commerce had a clear, non-discretionary duty to end this labeling requirement or that the agency otherwise failed in its duty to revoke the orders. Accordingly, Plaintiffs have not met the first burden required for mandamus on this issue.

Plaintiffs next argue that the Commission's negative remand determinations triggered a clear duty for Commerce to issue liquidation instructions for the subject merchandise entered after July 11, 2005. Pl.'s Br. 7–10. This argument is unavailing. As this court explained in Slip Op. 11–124,

> when a reviewing court issues a final (non-interlocutory) decision that is not in harmony with a contested agency determination, Commerce must publish notice of such a decision in the Federal Register. 19 U.S.C. § 1516a(c)(1). Under *Timken*, the published notice has the effect of suspending liquidation of the subject entries until there is a "final court decision" under 19 U.S.C. § 1516a(e). *See* [*Timken v. United States*, 893 F.3d 337, 341 (Fed. Cir. 1990); *Hosiden Corp. v. United States*, 85 F.3d 589, 591 (Fed. Cir. 1996); *Diamond Sawblades v. United States*, 626 F.3d 1374, 1381 (Fed. Cir. 2010)]. A decision by the Court of

[2] Plaintiffs also suggest that Commerce "only purportedly revoked the order, instructing [Customs] to continue collection of estimated duties at a rate of zero percent . . . ." Pl.'s Br. 8 (citations omitted). At best, however, this amounts to no more than a self-serving interpretation of the *Revocation Notice*, which clearly instructs Customs "to discontinue the collection of cash deposits for estimated antidumping duties." *Revocation Notice*, 76 Fed. Reg. at 41,762; *see also* Pl.'s Br. Ex. 2 (Message Nos. 1196309 and 1196310 indicating Customs shall "continue the suspension of liquidation of such entries without a cash deposit").

> International Trade that has been appealed is not considered the "final court decision" under the statute.

See Slip Op. 11–124 at *9–10 (citations omitted). Plaintiffs' entries entered after July 11, 2005, are therefore suspended by operation of law until there is a final court decision that fixes the antidumping duty rate, if any, on the ball bearings.[3] The court cannot order liquidation when binding authority mandates that liquidation is suspended until a final court decision is reached.

Plaintiffs also argue that Customs had an clear, non-discretionary duty to liquidate pursuant to 19 U.S.C. § 1504(d), even in the absence of instructions from Commerce to do so. Pl.'s Br. 7–8; Pl.'s Reply 13. Section 1504(d) provides that "when a suspension [of liquidation] required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 month after receiving notice of the removal from [Commerce], other agency, or a court with jurisdiction over the entry." 19 U.S.C. § 1504(d). Here, the subject entries are suspended by operation of law until the issuance of a final court decision. *See, e.g.*, *Timken*, 893 F.3d at 341–42. Therefore, no agency or court may remove the suspension of liquidation until there is a final court decision, *see id.* ; § 1516a(e); *see also Revocation Notice*, 76 Fed. Reg. at 41,762, and Plaintiffs are not entitled to mandamus on this issue.

Finally, Plaintiffs argue that Commerce had a clear, non-discretionary duty to refund with interest all cash deposits made on its entries following the Commission's negative determination. Pl.'s Br. 9; Pl.'s Reply 1–2, 9. Plaintiffs again fail to provide any statutory, regulatory, or precedential support for this argument and, accordingly, have failed to establish a clear, nondiscretionary duty regarding cash deposits in this case.

Plaintiffs have also failed to satisfy the other elements of mandamus for the same reasons discussed in Slip Op. 11–124. Slip Op. 11–124 at 11.

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[3] As Consolidated Plaintiff NTN Corp. noted in its opening brief, Plaintiffs' entries were not subject to the decision in *NSK*, the case in which the Commission's original determinations were contested. NTN Corp. Br. 18. Nevertheless, sections 1516a(c)(1) and (e) govern liquidation of entries "of the character" covered by contested determinations. *See* §§ 1516(a)(c)(1), (e). Plaintiffs' entries are subject to the antidumping duty orders and are subject to the suspension in the *Revocation Notice*. That Plaintiffs were not party to *NSK*, therefore, is of no moment to whether this statutory scheme governs liquidation of their entries.

IV. Conclusion

For these reasons, and in accordance with the court's opinion in Slip Op. 11–124, it is hereby

ORDERED that Plaintiffs' petition for a writ of mandamus is denied; it is further

ORDERED that Defendant's motion to dismiss under USCIT Rule 12(b)(1) is denied; and it is further

ORDERED that Defendant's motion to dismiss under USCIT Rule 12(b)(5) is denied as moot.

Dated: October 14, 2011
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 11–128

LIZARRAGA CUSTOMS BROKER, Plaintiff, v. BUREAU OF CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY; AND ROSA HERNANDEZ, PORT DIRECTOR, OTAY MESA, CALIFORNIA, Defendants.

Before: Richard K. Eaton, Judge
Court No. 08–00400

[Plaintiff's application for fees and other expenses pursuant to Equal Access to Justice Act is granted.]

Dated: October 17, 2011

Sandler, Travis & Rosenberg, P.A. (*Arthur K. Purcell* and *Kenneth N. Wolf*), for plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Justin R. Miller*); Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Nancy Gudel*), for defendants.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

This case is before the court on plaintiff Guillermo Lizarraga's ("plaintiff" or "Lizarraga") application for fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (2006). The application follows the defendants' Confession of Judgment dated April 30, 2010 (the "Confession of Judgment") and the subsequent entry of judgment in plaintiff's favor. *See Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, 34 CIT __, Slip Op. 10113 (Oct. 4, 2010). Defendants, the Bureau of Customs and Border Protection ("Customs"), the U.S. Department of Homeland Security, and Rosa Hernandez, Port Director for the Otay Mesa Port of Entry, San Diego, California (collectively, "defendants"), oppose the application.

For the reasons set forth below, the court grants plaintiff's application for fees.

BACKGROUND

I. Entry Filer Code

An entry filer code is a unique, three character code that Customs assigns to a licensed customs broker. 19 C.F.R. § 142.3a(b)(1) (2011). Filing "entries" means the filing of documentation required to ensure the release of imported merchandise from Customs' custody, or the act of filing that documentation. *Id.* § 141.0a(a).

Entries can be filed either manually or electronically through the Automated Broker Interface ("ABI") system. *Id.* §§ 143.34, 143.32(a). Ninety-six percent of all entries are filed electronically, and that figure is likely higher for licensed brokers. *See Automated Broker Interface (ABI)*, CBP.gov, http://www.cbp.gov/xp/cgov/trade/automated/automated_systems/abi/ (last visited Sept. 20, 2011). Each electronically-filed entry is identified by an entry number created by the broker. 19 C.F.R. § 142.3a(a), (b). The first three digits of the entry number are the broker's entry filer code. *Id.* § 142.3a(b)(1). Accordingly, the entry filer code identifies the broker filing a particular entry. The ABI system is part of Customs' Automated Commercial System that allows entry filers to both submit data electronically and receive messages from Customs. *Id.* § 143.1. In order to file electronically, the broker must have an active entry filer code and be approved for participation in the ABI system. *Id.* §§ 143.2, 143.34. The purpose of ABI is "to improve administrative efficiency, enhance enforcement of customs and related laws, lower costs[,] and expedite the release of cargo." *Id.* § 143.1.

II. Suspension of Plaintiff's Entry Filer Code

Mr. Lizarraga is a licensed customs broker, and in 2008 had an assigned entry filer code. Under 19 C.F.R. § 142.3a(d), "[t]he Assistant Commissioner, Office of International Trade, or his designee may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker." On October 21, 2008, the Director of Field Operations at the Otay Mesa Port of Entry in San Diego, California wrote to the Assistant Commissioner of the Office of International Trade and asked that Mr. Lizarraga's entry filer code be deactivated for misuse. Mem. from Dir. Field Operations to Asst. Comm'r, Office of Int'l Trade, Oct. 21, 2008 (C.R. Doc. 152). Although it did not compile a contemporaneous record,[1] Customs has represented that it then conducted an "internal administrative review" of the Director's request. On November 3, 2008, the Assistant Commissioner "made

[1] On January 23, 2009, Customs filed, what it identified as, the administrative record. The record was comprised of three looseleaf binders containing 156 documents amounting to roughly 1,000 pages. Admin. R. (C.R. Doc. 1–156). Of these, the Assistant Commissioner of the Office of International Trade had before him one document consisting of four pages when he made the determination to suspend Mr. Lizarraga's entry filer code. *See* Baldwin Decl., Mar. 3, 2010. The court thoroughly reviewed the documents and on February 24, 2010, conducted a hearing at which counsel for defendants reviewed the documents in the record in open court. Tr. Or. Arg., Feb. 24, 2010, 6:10–28:2. The first two volumes of the record contained 122 documents, and about 800 pages whose purpose appeared to be to demonstrate to the court that Mr. Lizarraga was a sloppy bookkeeper and a thorn in the side of Customs generally, e.g.:

> THE COURT: Volume 1 seems to have a lot of audits of Mr. Lizarraga which seem to me to be completely off the point. The audits find that he isn't conducting business the way [Customs] might have hoped. They make the findings. They ask him to correct things. He corrects them or doesn't correct them. There are letters back and forth. None of these things seem to have, at least in Volume 1 -- I've had a lot of trouble figuring out how the [entry filer] code was involved.

Tr. Or. Arg., Feb. 23, 2010, 7:8–7:15. The first document to which counsel for the defendants pointed as having to do with the suspension of the entry filer code was Document 146, which was found at about eighty percent of the way through Volume 3. This document consists of notes, compiled with the assistance of counsel, that purport to memorialize previous discussions. Tr. Or. Arg., Feb. 23, 2010, 9:16–10:19. Thus, while there was, arguably, some kind of "internal administrative review," no record was made of it while it was being conducted. For instance, with respect to evidence that Mr. Lizarraga had provided his entry filer code for use by Mexican nationals, document 152 was prepared by counsel after the fact:

> [COUNSEL FOR DEFENDANTS]: That information was based upon interviews that I had conducted with individuals involved in a transaction and then that information was then transmitted to Customs, the trade aspect of it. So there wouldn't be any -- 152 is a summary of the conversations between [U.S. Immigration and Customs Enforcement] and Customs.
>
> THE COURT: Let me *see* if I've got this straight. You provided me with these three volumes. They're supposed to represent the record but that there is nothing . . . in the record to back up this statement [regarding providing the entry filer code to Mexican nationals]?
>
> [COUNSEL FOR DEFENDANTS]: 152 would be the documentary evidence.
>
> THE COURT: 152 is just -- so there's nothing to back up the material that [the Assistant Commissioner] made his determination on other than 152?
>
> [COUNSEL FOR DEFENDANTS]: Other than the conversations between individuals.
>
> THE COURT: But they're not the record.
>
> [COUNSEL FOR DEFENDANTS]: No, Your Honor, they're not.

Tr. Or. Arg., Feb. 23, 2010, 10:15–11:6. It is worth noting that the Assistant Commissioner did not, in fact, even have document 152 before him when he made his determination. *See* Baldwin Decl., Mar. 3, 2010.

the final determination to indefinitely and immediately suspend Mr. Lizarraga's entry filer code" for misuse (a final determination later memorialized in a letter to Mr. Lizarraga dated November 10, 2008). *See* Letter from Port Dir. to Lizarraga, Nov. 10, 2008 (C.R. Doc. 156) ("Port Dir. Letter"). The Assistant Commissioner stated that "[t]he suspension is necessary to prevent Mr. Lizarraga from using his individual filer code to facilitate smuggling narcotics into the Customs territory of the United States and allowing the use of his license, permit, and filer code . . . by Mexican nationals." Mem. from Asst. Comm'r, Office of Int'l Trade to Dir. Field Operations (C.R. Doc 155) ("Asst. Comm'r Mem."). Customs did not provide Mr. Lizarraga with notice of its internal administrative review or an opportunity for a hearing, nor did it solicit a written submission from him prior to its final determination.

Instead, by letter dated November 10, 2008,[2] Customs notified plaintiff that, effective November 14, 2008, it would "immediately and indefinitely" suspend his entry filer code. Port Dir. Letter (C.R. Doc. 156). The notice cited 19 C.F.R. § 142.3a(d) as authority for defendants' action, and stated that the action was "necessary to prevent the misuse of [Lizarraga's] filer code in the conducting of customs business." Port Dir. Letter (C.R. Doc. 156). The notice also stated that the suspension was to prevent Mr. Lizarraga from using his individual filer code to "facilitate smuggling narcotics," and to ensure that plaintiff's "license, permit, name[,] and filer code are not used by persons who are not employed by [Lizarraga] and authorized to act for [Lizarraga]." Port Dir. Letter (C.R. Doc. 156).

The notice further stated:

> By requiring you to use the alternative filing procedures found in 19 CFR § 142.3a(e), [Customs] will be able to effectively review the accuracy of the documentation you are submitting for the entry of merchandise. *This will enable you to continue conducting customs business; however, you will be required to file entry/entry summary documentation using customs assigned numbers with estimated duties attached before the merchandise may be released*.

Port Dir. Letter (C.R. Doc. 156).

Thus, Customs stated that, even though he could no longer use his entry filer code, Mr. Lizarraga would nonetheless be able to continue to conduct his business as a customs broker.

[2] Plaintiff received this notice on November 11, 2008. Lizarraga Aff. ¶ 2.

III. Proceedings in CIT

On November 13, 2008, Mr. Lizarraga sought to halt the suspension of his entry filer code by filing a motion for a temporary restraining order ("TRO") and a preliminary injunction. At the November 14, 2008 hearing, defendants opposed the entry of the TRO, in part, because they claimed the case involved America's national security. As counsel for defendants stated:

> The importation of narcotics under an importer's filer code or a broker's filer code is illegal activity and effectively it represents a situation where the balance of hardships once those drugs come into the country would be adverse to the United States and the national security of the United States . . . . [N]arcotics were imported under this filer code. So Customs has every right at this juncture to be concerned about the abuse or misuse of that filer code and every right to take every precaution available to it to insure national security for this country.

Tr. Or. Arg., Nov. 14, 2008, 8:15–9:1.

After the hearing with both sides present, the court granted plaintiff's motion for a TRO, issued an order to show cause why a preliminary injunction should not be granted, and set a hearing date. A briefing schedule was established, which was subsequently modified by the parties. Thereafter, defendants agreed to take no action against plaintiff's entry filer code until the court ruled on the preliminary injunction. *See* Order at 2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Dec. 23, 2008) (acknowledging defendants' consent not to suspend plaintiff's entry filer code during the time the preliminary injunction was pending); *see also* Order at 1, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Mar. 1, 2010) (reiterating that defendants would not suspend plaintiff's entry filer code until the court ruled on the motion for preliminary injunction).

Further, on November 13, 2008, plaintiff filed his verified complaint alleging, among other things, that he was a licensed customs broker and that Customs has "issued a notice . . . that plaintiff's entry filer code will be deactivated effective November 14, 2008." Compl. ¶ 5. Plaintiff's complaint alleged that "Customs' plan to suspend or deactivate plaintiff's entry filer code without any explanation or hearing was effectively a revocation or suspension of plaintiff's broker's license without any showing of good cause, and without the benefit of a hearing or other due process protections." Compl. ¶ 21. In addition to the preliminary injunction, the complaint sought relief in the form of a declaratory judgment and a permanent injunction restraining the defendants "from suspending his entry filer code without a hearing providing for basic due process, in accordance with the letter or spirit of 19 U.S.C. § 1641(d)(2)(B)."[3] Compl. ¶ 23(c).

On January 12, 2009, defendants filed their Answer to the Complaint. On January 23, 2009, defendants filed the administrative record, and on March 27, 2009, they filed their motion to dismiss and for judgment on the agency record. Thereafter, on July 13, 2009, defendants moved for a voluntary remand. In their papers seeking the voluntary remand, defendants stated:

> Remand is particularly appropriate in this case, as we have been advised by Customs that upon remand, *the agency will issue a new notice of action and then allow Mr. Lizarraga to administratively challenge the agency's action. The new notice of action will include a description of the procedures Mr. Lizarraga may use to contest Custom's new notice of action*. If Mr. Lizarraga decides to administratively challenge the agency's action, the agency will review the issues presented by Mr. Lizarraga and make a new determination as to whether his entry filer code should be suspended or deactivated.

Defs.' Mot. to Stay & for Vol. Remand ("Defs.' Remand Mot.") 3. Thus, as early as July 13, 2009, defendants acknowledged that Mr. Liz-

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[3] Had Customs actually sought to revoke Mr. Lizarraga's broker's license it would have had to comply with 19 U.S.C. § 1641(d)(2)(B) (2006) which provides:

> **Revocation or suspension**
>
> The Customs Service may, for good and sufficient reason, serve notice in writing upon any customs broker to show cause why a license or permit issued under this section should not be revoked or suspended. The notice shall be in the form of a statement specifically setting forth the grounds of the complaint, and shall allow the customs broker 30 days to respond. If no response is filed, or the Customs Service determines that the revocation or suspension is still warranted, it shall notify the customs broker in writing of a hearing to be held within 30 days, or at a later date if the broker requests an extension and shows good cause therefor, before an administrative law judge appointed pursuant to section 3105 of title 5 [5 U.S.C. § 3105 (2006)], United States Code, who shall serve as the hearing officer. If the customs broker waives the hearing, or the broker or his designated representative fails to appear at the appointed time and place, the hearing officer shall make findings and recommendations based on the record submitted by the parties. At the hearing, the customs broker may be represented by counsel, and all proceedings, including the proof of the charges and the response thereto shall be presented with testimony taken under oath and the right of cross-examination accorded to both parties. A transcript of the hearing shall be made and a copy will be provided to the Customs Service and the customs broker; which shall thereafter be provided reasonable opportunity to file a post-hearing brief. Following the conclusion of the hearing, the hearing officer shall transmit promptly the record of the hearing along with the findings of fact and recommendations to the Secretary for decision. The Secretary will issue a written decision, based solely on the record, setting forth the findings of fact and the reasons for the decision. Such decision may provide for the sanction contained in the notice to show cause or any lesser sanction authorized by this subsection, including a monetary penalty not to exceed $30,000, than was contained in the notice to show cause.

arraga was entitled to an opportunity to be heard, and that he had been denied this due process by Customs' actions.

Plaintiff objected that the proposed administrative review did not address all of Mr. Lizarraga's claims. Pl.'s Resp. to Defs.' Remand Mot. 1 ("Inherent in defendants' otherwise vague proposal for remand is an admission that [Customs] failed to provide due process to Mr. Lizarraga as required by law. . . . Under the Administrative Procedure[ ] Act ("APA"), the challenged agency action must be held unlawful and set aside because it was undertaken contrary to law. That result is consistent with law and Mr. Lizarraga's legitimate expectation of finality after nine months of litigation."). Therefore, because Customs' offer of an opportunity to be heard was not accompanied by a concession that Customs' previous actions should be set aside, plaintiff did not consent to the remand. On August 6, 2009, the court denied defendants' remand motion. Order at 2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Aug. 6, 2009) ("[T]he stay would not end in a determination concerning the actions already taken by [Customs].").

Subsequently, the parties briefed and the court granted defendants' request to file an amended answer, which was filed on September 17, 2009. In their Amended Answer, defendants stated: "defendants admit that the suspension or deactivation of a broker's entry filer code must comport with 5 U.S.C. § 558." Am. Answer ¶ 22(iii); *see also* Tr. Or. Arg., July 15, 2010, 11:7–19 (acknowledging same). The significance of the citation to 5 U.S.C. § 558 is that this section is part of the Administrative Procedure Act, and provides for the "annulment of a licence" only after the "licensee has been given—(1) notice by the agency in writing of the facts or conduct which may warrant action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c).

Briefing of the pending motions was complete as of November 13, 2009. Oral argument was held on February 24, 2010. At the conclusion of the February 24th hearing, the court stayed proceedings until March 10 to provide the parties an opportunity to pursue settlement. Thereafter, the parties informed the court that they were unable to settle the case. On March 26, 2010, the court issued an order remanding the matter to Customs solely for the purpose of making a record before an administrative law judge with respect to plaintiff's claim that the suspension of his entry filer code would be tantamount to a revocation of his broker's license. Order at 2–4, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Mar. 26, 2010).

On April 23, 2010, defendants filed their Confession of Judgment in plaintiff's favor and moved to stay the execution of the remand order pending entry of the judgment itself. The sole reason the defendants gave for proffering their Confession of Judgment was: "We have engaged in a cost/benefit analysis with respect to retaining and administering an ALJ, and based upon our analysis we offer the following Confession of Judgment . . . ." Confession of Judgment 2–3.

The substantive portion of the Confession of Judgment requested a "judgment granting relief in favor of plaintiff Guillermo Lizarraga (Mr. Lizarraga), as stated herein and in the proposed order, be entered." Confession of Judgment 1. Further, it offered the following "Confession of Judgment: we agree not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of the attached proposed Court order.)." Confession of Judgment 3 (footnote omitted). By these words, Customs effectively "set aside" its previous actions taken to suspend Mr. Lizarraga's entry filer code.

Further, at oral argument defendants represented to the court that Customs would not seek to summarily suspend a broker's entry filer code:

> Well, we know for certain that brokers are entitled to the APA if their entry filer code is deactivated, the procedur[al] protections of the APA. So with respect to what occurred to Mr. Lizarraga in this instance, the Customs treatment of Mr. Lizarraga, it's certain that that is not going to occur again.

Tr. Or. Arg., July 15, 2010, 10:13–18. Counsel's reference to the APA was to the provisions of 5 U.S.C. § 558.

Thereafter, in *Lizarraga*, the court found that the Confession of Judgment mooted plaintiff's motion for a preliminary injunction because it "remove[d] the threat that his business will be harmed as a result of the findings of the internal investigation." *Lizarraga*, 34 CIT at __, Slip Op. 10–113, at 14 (Oct. 4, 2010). The accompanying judgment ordered:

> judgment granting relief in favor of plaintiff is hereby entered; . . . the Remand Order dated March 26, 2010 is declared moot, and thus the parties are relieved from compliance therewith; . . . the defendants shall not suspend or deactivate plaintiff's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of this judgment); and . . . the suspension, deactivation, revocation or similar act or threat thereof of a broker's entry filer code must comport, at a minimum, with 5 U.S.C. § 558(2006).

Judgment at 1–2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Oct. 4, 2010).

On December 21, 2010, plaintiff filed a Form 15 application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and USCIT R. 54.1, seeking a reimbursement of attorney's fees in the amount of $223,305.83 and an additional $2,850.16 for costs and expenses, for a total of $226,155.99.

DISCUSSION

I. Equal Access to Justice Act Framework

Under EAJA, "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (2006). A position is substantially justified if it is "justified to a degree that could satisfy a reasonable person" and has a "'reasonable basis in both law and fact.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal citation omitted). The government's "position" includes the underlying actions of any administrative agency, as well as the government's litigation arguments. *Smith v. Principi*, 343 F.3d 1358, 1361–62 (Fed. Cir. 2003). Although the "position" of the government involves prelitigation conduct as well as the litigation itself, "only one threshold determination for the entire civil action is to be made." *Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 159 (1990).

Pursuant to EAJA, an application for fees and expenses must be granted when: "(1) the claimant is a prevailing party; (2) the government's position during the administrative process or during litigation was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement." *Former Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 28 CIT 1571, 1577, 350 F. Supp. 2d 1075, 1081 (2004) (citing 28 U.S.C. § 2412(d)(1)(A)-(B)). Furthermore, the court "shall not . . . award[ ] in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii).

II. Plaintiff's Eligibility for Fee-Shifting Based on Case's Procedural History

Defendants begin their response to Mr. Lizarraga's application by arguing that the court need not engage in the four-part analysis, outlined above in *Tyco*, because the plain language of the EAJA statute demonstrates that the fee-shifting provisions do not extend to issues that were never addressed by the court:

> Ultimately, the Court never reached the merits of Mr. Lizarraga's claims or the merits of the Government's dispositive motions as the Government filed a Confession of Judgment that disposed of the case prior to the effectuation of the Remand Order. Specifically, under the Confession of Judgment, the Government agreed not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event.

Defs.' Mem. in Opp. to Pl.'s Appl. ("Defs.' Mem.") 3. In other words, defendants assert that the plaintiff may seek EAJA reimbursement only for claims actually considered by the court. Here, defendants insist that Mr. Lizarraga is not entitled to an award of fees because the court never determined if he was entitled to the full due process protections he would have received had Customs sought to revoke his broker's license.

In making their argument, defendants contend that entertaining Mr. Lizarraga's application would put the court "'in the position of conducting essentially de novo review of the entire case for purposes of the fee litigation, contrary to the command against 'spawn[ing] a second litigation' of the Supreme Court and to the far more streamlined 'substantial justification review' envisioned by the EAJA itself.'" Defs.' Mem. 10 (quoting *Hardisty v. Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011)); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001) ("We have also stated that 'a request for attorney's fees should not result in a second major litigation, and have accordingly avoided an interpretation of fee-shifting statutes that would have 'spawned a second litigation of significant dimension.'" (internal citations omitted)).

The court finds that the *Hardisty* rationale does not extend to the circumstances of this case. In *Hardisty*, the plaintiff challenged his denial of supplemental disability income by the Social Security Administration on several grounds. *Hardisty*, 592 F.3d at 1075. The district court, however, remanded solely on the basis that the agency improperly discredited the plaintiff's testimony. In doing so, the court chose not to consider the other arguments raised by him. *Id.* When the plaintiff later sought EAJA fees, the court concluded that, because the agency was "substantially justified" in contesting Hardisty's credibility, he was not entitled to attorney's fees on the issue of his testimony. In addition, the court declined to award attorney's fees based on the other arguments that it had chosen not to reach. *Id.* at 1077 ("Nothing in these provisions extends fee-shifting to issues not adjudicated. Section 2412(d)(1)(A) provides no indication that attorneys' fees should be awarded with respect to positions of the United States challenged by the claimant but unaddressed by the reviewing court."). The Court of Appeals for the Ninth Circuit affirmed the latter ruling.

The posture of this case distinguishes it from *Hardisty*. First, as defendants themselves pointed out in their papers seeking entry of the Confession of Judgment,

> [h]ere . . . we agree not to suspend or deactivate Mr. Lizarraga['s] entry filer code for any past fact or event. This is the sum of the relief that is legally available to Mr. Lizarraga regarding his challenge to the merits of [Customs'] determination to suspend or deactivate his code . . . . Accordingly, pursuant to Article III, there is no longer a justiciable case or controversy with respect to this claim.

Confession of Judgment 4. Thus, as defendants acknowledge, the question of the legality of Customs' actions in suspending Mr. Lizarraga's entry filer code was before the court and resolved in his favor.

In addition, while defendants characterize the due process claim as being rendered moot, for purposes of this application that is not precisely the case. That is, while defendants assert that they did not concede the issue of whether Mr. Lizarraga was entitled to the procedural protections of section 1641(d), Defs.' Mem. 3, they did concede the larger due process point.

Indeed, throughout this litigation, Customs has progressively acknowledged that Mr. Lizarraga was entitled to, and denied, due process at the administrative level. Thus, in their Motion for a voluntary remand, Amended Answer, statements in open court, and Confession of Judgment, the defendants effectively conceded that Mr. Lizarraga had been denied adequate due process administratively. Defendants first made this concession by seeking a voluntary remand to revisit Customs' decision to suspend Mr. Lizarraga's entry filer code, and offering to provide him with notice and an opportunity to challenge Customs' actions. Defendants' concession became more specific by admitting that he was entitled to the protections of 5 U.S.C.

§ 558, Amend. Answer ¶ 22(iii), and making similar statements in open court during their motion for entry of the Confession of Judgment. Finally, in the Confession of Judgment, Customs annulled its acts at the administrative level and provided guarantees of due process in the future. Therefore, even though the Confession of Judgment prevented the court from ruling on the exact nature of the required due process, the overarching issue (i.e., that Mr. Lizarraga was entitled to some due process protection) was admitted by Customs.

In fact, counsel for defendants conceded that not only would Mr. Lizarraga be entitled to the benefits of the APA should he again find himself in the situation presented here, but that "brokers are entitled to the APA." Tr. Or. Arg., July 15, 2010, 10:13–14. This admission was then included in the declaratory portion of the court's judgment ending the case. Judgment at 1–2, *Lizarraga Customs Broker v. U.S. Customs & Border Protect.*, No. 08–00400 (Oct. 4, 2010) ("the suspension, deactivation, revocation or similar act or threat thereof of a broker's entry filer code must comport, at a minimum, with 5 U.S.C. § 558 (2006)." Thus, although the court may not have ruled on the merits of the precise limits of the due process to which Mr. Lizarraga was entitled (i.e., whether he was entitled to the same level of due process that he would have been had Customs wished to revoke his broker's license), the material issues in this case were resolved in plaintiff's favor. This is demonstrated by the judgment, which granted relief with respect to Customs' acts in suspending Mr. Lizarraga's entry filer code and as to the minimum due process requirements to be afforded brokers thereafter.

Moreover, unlike the Court in *Hardisty*, the court was fully engaged with and cognizant of all of the due process arguments in this case throughout the litigation. This was not the situation in *Hardisty*, a primary concern of the Ninth Circuit:

> Such an inquiry requires the district court to decide whether government positions it may not have evaluated at all were in fact substantially justified. That puts the district court in the position of conducting essentially de novo review of the entire case for purposes of the fee litigation . . . . We decline to impose such burdens on district courts.

Hardisty, 592 F.3d at 1078. That is not the case here, however, because the court reviewed all of the relevant facts and law in the case. Specifically, on February 24, 2010, the court conducted a hearing at which the administrative record was examined in detail. In addition, the opinion accepting defendants' Confession of Judgment discussed both the revocation of the entry filer code and due process considerations. Therefore, addressing this EAJA application will not "spawn a second litigation" that raises facts and legal issues unfamiliar to the court.

Important policy reasons also support allowing EAJA applications to proceed in cases conceded by the government before resolution by a court. As the Supreme Court emphasized, "[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. Immigration & Naturalization Srv.*, 502 U.S. 129, 138 (1991). The government, therefore, should not be able to avoid liability simply by precluding decisions on the merits. In *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977), the Court, although discussing fee-shifting in the context of a Title VII case that did not advance past the filing of a complaint, noted that:

> [i]f the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. Thus, a general bar to awards of fees in cases resolved before final judgment cannot be accepted by the court.

Foster, 561 F.2d at 343 (citations omitted). Similar concerns are present here.

Therefore, the court holds that plaintiff is not foreclosed from seeking EAJA fees for the reasons advanced by defendants. As such, a review of the four-part analysis set forth in *Tyco Electronics* is warranted.

A. Prevailing Party Status

The defendants do not dispute that plaintiff was the prevailing party in this action. Further, as plaintiff points out, an EAJA applicant can be the "prevailing party" for purposes of section 2412 where the requested relief is granted and the case declared moot. Pl's Br. in Supp. of Mot. for Att'y's Fees & Expenses ("Pl.'s Br.") 6 (citing *Atochem v. United States*, 9 CIT 207, 209, 609 F. Supp. 319, 321 (1985); *Consol. Int'l Auto., Inc. v. United States*, 16 CIT 692, 695, 797 F. Supp. 1007, 1010 (1992)). Specifically, plaintiff cites *Consolidated International* for the proposition that "a court should look to the substance of the litigation, and not merely to the technical disposition of the case or motion." *Consol. Int'l*, 16 CIT at 695, 797 F. Supp. at 1010. Mr. Lizarraga also relies on *United States v. Hitachi Am., Ltd.*, 24 CIT 497, 101 F. Supp. 2d 830 (2000), where this Court noted that a "prevailing party" is "one who 'succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,' not success on each issue sued." *Hitachi*, 24 CIT at 498, 101 F. Supp. 2d at 832 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

With these principles in mind, plaintiff argues that he "prevailed" in this litigation because a judgment was entered in his favor; he was successful in setting aside Customs' earlier action by blocking it from deactivating his entry filer code based upon any past facts or events; and further, that the case established a minimum level of due process to which a broker is entitled before his license can be suspended or deactivated. Pl.'s Br. 8; *see also Lizarraga*, 34 CIT at __, Slip Op. 10–113, at 16.

The court agrees with plaintiff that he was the "prevailing party." Only the most mechanical interpretation of that term could lead to a different conclusion based on the relief initially requested by Lizarraga and the final resolution of this case. In the demand for relief in his Complaint, plaintiff sought preliminary and permanent injunctions restraining the defendants from "suspending or deactivating plaintiff's entry filer code." Compl. ¶ 23(b), (c). Likewise, the final judgment in this case ordered that defendants shall "not suspend or deactivate plaintiff's entry filer code for any past fact or event," thus effectively setting aside Customs' actions. *Lizarraga*, 34 CIT at __, Slip Op. 10–113, at 14. In addition, defendants' remand request, their Amended Answer, defense counsel's representations in open court, and the judgment itself establish that, as a minimum, a broker similarly situated to Mr. Lizarraga is entitled to the benefits of the APA. *Lizarraga*, 34 CIT at __, Slip Op. 10–113, at 16–17. Looking to the "substance of the litigation" then, Mr. Lizarraga clearly prevailed in ultimately securing this permanent guarantee from the defendants. He thus unquestionably "'succeed[ed] on [a] significant issue in litigation,'" and "'achieve[d] some of the benefit [he] sought in bringing suit.'" *See Hitachi*, 24 CIT at 498, 101 F. Supp. 2d at 832 (citations omitted).

Therefore, plaintiff has satisfied the EAJA "prevailing party" element.

B. Substantial Justification

To determine if a position is "substantially justified," the Federal Circuit "requires that the Government show that it was *clearly* reasonable in asserting its position, *including its position at the agency level*, in view of the law and the facts." *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456 (Fed. Cir. 1986); *see also Shinyei Corp. of Am. v. United States*, No. 2010–1178, 2010 WL 4146384, at *3 (Fed. Cir. Oct. 22, 2010) (quoting *Pierce*, 487 U.S. at 565) ("A position is substantially justified if it is 'justified to a degree that could satisfy a reasonable person' and has a 'reasonable basis in law and fact.'"). The defendants bear the burden of demonstrating that their position was substantially justified. *See Nakamura v. Heinrich*, 17 CIT 119, 120 (1993) (not reported in the Federal Supplement) (citing *Gavette*, 808 F.2d at 1467).

> Courts are often reluctant to award fees because they have operated so long under the American rule prohibiting fee-shifting. In fact, the reluctance of the courts to award fees prompted the adoption of the language in Rule 37 on which this standard is based. Under these circumstances, it is particularly appropriate to place the burden on the government to prove the reasonableness of its actions. To do so encourages parties to contest action which they believe to be unreasonable and thereby serves to refine public policy.

Gavette, 808 F.2d at 1465–66 (quoting H.R. Rep. No. 1418, at 14 (1980)).

Plaintiff insists that defendants have not met their burden primarily because of Customs' actions at the administrative level. Looking at defendants' administrative position, Mr. Lizarraga stresses that defendants failed to give him notice of Customs' proceeding, or to offer him any opportunity to defend himself. Pl.'s Br. 8. He relies on *Bonanza Trucking Corporation v. United States*, 11 CIT 436, 664 F. Supp 1453 (1987), which involved the failure to disclose an internal investigative report in proceedings to revoke a license to cart bonded merchandise. Pl.'s Br. 8. The failure led this Court to question whether "asserting such denial of due process can ever result in an *ex post facto* determination under EAJA that the position of the United States in court was substantially justified." *Bonanza Trucking*, 11 CIT at 440, 664 F. Supp at 1456.

Plaintiff then notes that, despite the alleged gravity of his action (i.e., that the national security of the country was at stake), it was revealed during the litigation that Customs compiled no contemporaneous administrative record prior to the commencement of this action. Pl.'s Br. 10. Moreover, Mr. Lizarraga was not permitted to see, review, or respond to any of the "charges" underlying the agency's action. Pl.'s Br. 10. According to plaintiff, Customs also failed to provide him (or any other broker) with any guidance on what type of actions would constitute "misuse" of the entry filer code, and arbitrarily and capriciously denied his request for even a short delay of the effective date for deactivation. Pl.'s Br. 11. Taken together, then, Lizarraga contends that "from the point of view of a 'reasonable person,' defendants' position at the administrative level, particularly the decision to completely deny [] Lizarraga due process prior to taking action that defendants knew or should have known would destroy his business, would not be considered correct." Pl.'s Br. 12.

Defendants argue that their position regarding Mr. Lizarraga's due process claim was reasonable because: (1) it was based upon a reasoned examination of the entry process and the factors that distinguish entry filer codes from broker's licenses; (2) there is a "genuine dispute" between the parties as to whether Mr. Lizarraga should have been afforded the procedural protections of 19 U.S.C. § 1641(d) prior to the deactivation or suspension of his entry filer code; and (3) the question of what due process should be afforded customs brokers when their entry filer codes are deactivated is one of first impression, and the agency's processes were consistent with its mission of border security and protecting the integrity of the entry process. Defs.' Mem. 12.

The court concludes that defendants' position was unreasonable and that Customs has conceded as much. As noted, "only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159. That is, the measure of "substantial justification" is not made at various stages of a case, but only once. Here, it is clear that the actions taken at the agency level by Customs were not justified, and that defendants recognized that this was true early on in the proceedings before the court. First, even before filing their Amended Answer, defendants sought a voluntary remand to: (1) issue a new Notice of Action; and (2) allow Mr. Lizarraga to administratively challenge the agency's action. Defs.' Mot. to Stay & for Vol. Remand 2. Thus, at the beginning stages of the litigation, defendants recognized that Mr. Lizarraga was entitled to due process, which he had been denied when the initial determination was made.

Thereafter, defendants filed their Amended Answer which stated "defendants admit that the suspension or deactivation of a broker's entry filer code must comport with the [APA]." Am. Answer ¶ 22(iii). Thus, defendants conceded not only that Lizarraga and other brokers were owed due process, but they identified the minimum procedures to which they were entitled. Finally, in their Confession of Judgment, defendants conceded their error in suspending Mr. Lizarraga's entry filer code. Confession of Judgment 3 ("[W]e agree not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event."). Thus, it is clear that defendants acknowledged that Customs' actions were not based on a "reasoned examination" of the entry process, and that there was no genuine dispute on the case's two major issues, i.e., (1) that Customs was not legally justified in its suspension of Mr. Lizarraga's entry filer code; and (2) Mr. Lizarraga was entitled to due process before his entry filer code could be suspended. Indeed, the only "genuine dispute" in this case was the kind of due process that plaintiff was entitled to when Customs moved against him. Based on the foregoing, it is clear that defendants have not demonstrated that their position was substantially justified.

C. Special Circumstances

Should the court find that their position was not substantially justified, defendants argue, in the alternative, that special circumstances make a fee award unjust, as "equitable considerations weigh against awarding EAJA fees." Defs.' Mem. 24—25 (listing as such "equitable considerations": (1) "the alleged misuse associated with Mr. Lizarraga's filer code [that] was compromising the integrity of the entry process"; (2) the lack of "clear standards, by way of judicial precedent, statute, or otherwise, that could have guided the Government"; and (3) "Mr. Lizarraga's actions that . . . unnecessarily protracted this litigation"). They note that special circumstances have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith, where the case is one of first impression, or where there is an unsettled area of the law. Defs.' Mem. 24. Characterizing their actions during the litigation as "advanc[ing] a novel and credible legal theory," defendants view an award of attorney's fees in this case as "punish[ing] the Government for advancing a plausible legal argument in good faith." Defs.' Mem. 24.

Despite defendants' arguments to the contrary, the progress of this case demonstrates that defendants never advanced any novel theories, as they quickly moved to abandon their position with respect to Customs' administrative action. Although defendants claim that the decision to confess judgment was based on a cost/benefit analysis, it is simply not credible that they would abandon the country's national security because of the cost of engaging an administrative law judge. Rather, it seems clear that defendants realized their case was untenable, and sought an accommodative result. Indeed, defendants never advanced a "plausible legal theory," but rather progressively receded from Customs' initial position until ultimately conceding error and ending the case.

As to defendants' claim that Mr. Lizarraga unnecessarily protracted the litigation, the facts indicate the contrary. That is, plaintiff can hardly be said to have extended the case by refusing to agree to actions that were not in his best interest. For instance, had plaintiff agreed to the voluntary remand, there is no guarantee that he would have achieved the result of Customs withdrawing the suspension of his entry filer code, the very result he accomplished by continuing the case. Thus, this case presents no special circumstances that would preclude an EAJA award, rather, if the equities favor either party, it is plaintiff.

D. Timely Filed Itemized Statement

Under 28 U.S.C. § 2412(d)(1)(B), "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses . . . , including an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). Thus, the final component of the four-part analysis set forth in *Tyco Electronics* is whether "the fee application is timely and supported by an itemized fee statement." *Former Emps. of Tyco Elecs. v. U.S. Dep't of Labor*, 28 CIT 1571, 1577, 350 F. Supp. 2d 1075, 1081 (2004). For purposes of EAJA, an application is timely if it is filed "within thirty days of final judgment in the action," and "'final judgment' means a judgment that is final and not appealable." 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G). Under Fed. R. App. P. R. 4(a)(1)(B), a final judgment is appealable "within 60 days after the judgment or order appealed from is entered" when "the United States or its officer or agency is a party." Therefore, for purposes of EAJA, an applicant has thirty days from the expiration of the sixty-day appeal period to file an EAJA application. *See Impresa Construzioni Geom. Domenico Garufi v. United States*, 531 F.3d 1367, 1370 (Fed. Cir. 2008) ("[T]he time for filing an EAJA request [runs] from the expiration of the time for appeal, without consideration of whether the particular final judgement would have or could have been appealed.").

Here, final judgment was entered on October 4, 2010, *Lizarraga*, 34 CIT __, Slip Op. 10–113. Thus, the judgment was appealable until December 3, 2010 and plaintiff had until January 3, 2011 to file his EAJA application. Plaintiff filed his Form 15 application on December 21, 2010 and also provided the requisite itemized statement detailing the time expended on the case, as well as the appropriate supporting documentation demonstrating that he meets the net worth requirement of EAJA.[4] Pl.'s Decl. in Supp. of Appl., Ex. A, B. The defendants do not dispute that plaintiff's application was timely filed. Therefore, plaintiff has satisfied all four parts of the *Tyco* analysis.

III. Amount of Award

The plaintiff's itemized statement includes (1) 671 hours of attorneys' time; (2) 19.1 hours of paralegals' time; and (3) other costs and expenses totaling $2,850.16. Pl.'s Decl. in Supp. of Appl., Ex. A. The plaintiff thus seeks reimbursement for $223,305.83 in combined attorney and paralegal fees, and an additional $2,850.16 in costs and expenses, for a total of $226,155.99. Pl.'s Decl. in Supp. of Appl. 5 ¶ 13.

A. Apportionment

The problem arises as to how to handle fees incurred by Mr. Lizarraga with respect to pressing his position that he was entitled to "basic due process, in accordance with the letter or spirit of 19 U.S.C. § 1641(d)(2)(B)" as demanded in his Complaint. Compl. ¶ 23(c). That is, in his Complaint Mr. Lizarraga insisted that, before his entry filer code could be suspended, he was entitled to all of the procedures and protections to which he would have been entitled had Customs sought to revoke his broker's license. While it is clear that defendants' suspension of Mr. Lizarraga's entry filer code at the administrative level was not substantially justified, it is also clear that the precise degree of due process to which he was entitled at the administrative level remained an open question at the close of the case. The court never reached a final decision on this issue because defendants' Confession of Judgment ended the case.

The question then becomes whether Mr. Lizarraga is entitled to legal fees for all of the time his counsel expended, or only for the time spent on the precise issues on which he received a favorable judgment. In other words, while the court has rejected defendants' claim that Mr. Lizarraga is not entitled to any legal fees because it did not reach the merits of Mr. Lizarraga's claims, this does not settle the question of whether he is entitled to fees for the issues on which he did not receive all of the relief demanded in his complaint.

[4] Under 28 U.S.C. § 2412(d)(2)(B), parties eligible to recover fees and expenses under EAJA include "(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Here, plaintiff has demonstrated his eligibility through submission of an affidavit from his Certified Public Accountant. Baker Aff., Pl.'s Decl. in Supp. of Appl., Ex. B.

The court finds that Mr. Lizarraga is entitled to attorney's fees for all of the time his lawyers put into this case for two reasons. First, as noted, the inquiries to determine (1) whether plaintiff is a prevailing party and (2) whether there was a substantial justification for the government's actions are made once for the entire litigation, not on an issue-by-issue basis. This being the case, the Supreme Court has indicated that only one finding should likewise be made with respect to fees, unless the claims in a lawsuit are so distinct they could have been litigated in separate lawsuits. *See Hensley*, 461 U.S. at 435–36; *see also Wagner v. Shinseki*, 640 F.3d 1255, 1259 (Fed. Cir. 2011) (citing *Jean*, 496 U.S. at 160); *Barrera v. Principi*, 18 Fed. Appx. 901, 904 (Fed. Cir. 2001) (citing *Jean*, 496 U.S. at 161–62). Therefore, "a fee award presumptively encompasses all aspects of the civil action." *Jean*, 496 U.S. at 161; *see also Wagner*, 640 F.3d at 1259; *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1368 n.3 (Fed. Cir. 2003); *Barrera*, 18 Fed. Appx. at 904. Here, as discussed *supra*, the court concludes that plaintiff was the prevailing party and that the defendants' positions were not substantially justified. Having made these threshold determinations, the court is not required to further this inquiry on an issue-by-issue basis for the purposes of awarding attorney's fees under EAJA.

Second, even if the court were inclined to examine plaintiff's entitlement to fees on an issue-by-issue basis, this approach would be impracticable in this case. Indeed, apportioning the fee award here is inappropriate because the issues were so inextricably linked that they cannot be separated in any meaningful way. In cases where "a plaintiff . . . present[s] in one lawsuit distinctly different claims for relief that are based on different facts and legal theories . . . , counsel's work on one claim will be unrelated to his work on another claim." *Hensley*, 461 U.S. at 434–35. In such cases, the "congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 435.

In other cases, however, "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.*; *see also Plyler v. Evatt*, 902 F.2d 273, 280–81 (4th Cir. 1990) (quoting *Hensley*, 461 U.S. at 435) ("[W]here the issues presented in the later proceedings or in separate claims involve the same common core of facts or related legal theories, the case 'cannot be viewed as a series of discrete claims.'"). In such cases, "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." *Jean*, 496 U.S. at 161–62.

Here, the issue central to all of plaintiff's claims and all of defendants' defenses was the due process, if any, to which Mr. Lizarraga was entitled when Customs took steps to suspend his entry filer code. Thus, the issues were "overlapping and intertwined." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981). When the issues in a case are "overlapping and intertwined," a court may decline "to dissect the interlocking evidence and consider it in isolation as supporting only one claim or the other." *Williams v. Roberts*, 904 F.2d 634, 640 (11th Cir. 1990); *see also Plyler*, 902 F.2d at 280–81 (quoting *Willie M. v. Hunt*, 732 F.2d 383, 386 (4th Cir. 1984) ("Here the district court acted within its discretion in ruling that the issues . . . were so 'inextricably intermingled with the original claims in the lawsuit' that severing those proceedings for a separate analysis of 'prevailing party' status was not justified."); *Afro-Am. Patrolmen's League v. City of Atlanta*, 817 F.2d 719, 725 (11th Cir. 1987) (quoting *Jones*, 636 F.2d at 1382) ("'In fixing the fee, the district court should be mindful that in complex civil rights litigation . . . issues are overlapping and intertwined.'").

Thus, plaintiff is entitled to fees for all of the hours spent prosecuting his case.

B. Special Factor Enhancement

When granting an application for attorney's fees, the court is directed to award "reasonable fees and expenses." 28 U.S.C. § 2412(b). Pursuant to 28 U.S.C. § 2412(d)(2)(A), "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase of cost of living or a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

Counsel for plaintiff seeks a special factor enhancement and in the event the court does not award such increase, a cost of living fee adjustment.

According to Mr. Lizarraga's lawyers, the "special factor" enhancement applies to this case because they have "extensive experience in customs law and litigation, and distinctive knowledge and specialized skill in the representation of customs brokers," and "[t]he competent and effective prosecution of plaintiff's case required the specialized skills in customs practice and litigation and knowledge of the customs brokerage regulations and practices that are beyond what general practice lawyers would encounter." Pl.'s Br. 22—23. In other words, plaintiff believes a special factor enhancement is required here because (1) his counsel possess expertise in a specialized practice area; and (2) these specialized skills were necessary to adequately represent the client.

At the outset, it should be noted that the grant of a special factor enhancement is conditioned upon the requirement that specialized skill was actually needed for the action before the court. In *Pierce*, the Supreme Court clarified that the EAJA special factor exception for qualified attorneys "refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question." *Pierce*, 487 U.S. at 572. The Court noted, as an example of a special factor, expertise in "an identifiable practice specialty such as patent law." *Id.* The Court then listed several factors that it deemed *insufficient* to merit an increase in the statutory cap: "[t]he 'novelty and difficulty of issues,' 'the undesirability of the case,' the 'work and ability of counsel,' and 'the results obtained.'" *Id.* at 573 (internal citations omitted). The Court explained that these "are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are." *Id.*

As this Court has found in the past, for purposes of EAJA, customs law is a specialized practice area, distinct from general and administrative law. *Jazz Photo Corp. v. United States*, 32 CIT __, __, 597 F. Supp. 2d 1364, 1369 (2008) (citing *Nakamura v. Heinrich*, 17 CIT 119, 121 (1993) (not reported in the Federal Supplement)). It is not clear, however, that specialized customs law skills were required for competent representation in this case. *See Jazz Photo*, 32 CIT at __, 597 F. Supp. 2d at 1369–70 (declining to award a special factor enhancement for all issues in a customs case except for one because "specialized customs law skills" were only required for that one issue) (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004) ("*Pierce* made clear that an increase in the cap is justified only by work requiring specialized skills or knowledge beyond what lawyers use on a regular basis. Producing high-quality work on a short deadline hardly satisfies this standard.")).

Having been an active participant in this case throughout, the court finds that the due process arguments that were central to the case could have been made by any competent lawyer familiar with administrative law. Furthermore, the knowledge needed to make Mr. Lizarraga's arguments with respect to the importance of the entry filer code could have been conveyed to any competent attorney by plaintiff himself. This being the case, the novelty and difficulty of the issues, although they were present, did not require the attention of lawyers who specialize in customs law.

In addition, while customs law is a specialized area of law, the special factor of "the limited availability of qualified attorneys for the proceedings involved," 28 U.S.C. § 2412(d)(2)(A)(ii), also implies difficulty in securing qualified counsel at a reasonable rate due to scarcity or other factors. *Jazz Photo*, 597 F. Supp. 2d at 1370 (citing *Hyatt v. Barnhart*, 315 F.3d 239, 249 (4th Cir. 2002)). Indeed, "the statute does not assign extra compensation by 'fields' but by asking the practical question whether in the case at hand lawyers qualified to handle the case can be found for $125 or less." *Atl. Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 492 (1st Cir. 2000). As defendants point out, even if specialized skills were required to litigate this case, plaintiff has made no showing that he could not have secured counsel at the regular rate. Defs.' Mem. 28. Indeed, plaintiff has not even argued that there were no other attorneys available who could have handled the case. *Id.* at 29. As a result, plaintiff is not entitled to a special factor enhancement.

C. Cost of Living Adjustment

With respect to an increase for the cost of living, based on long-established precedent and the defendants' failure to object, the court finds that a cost of living increase is warranted. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). The court may exercise judicial discretion in granting cost of living adjustments so as to effectuate the intent of Congress "to provide adequate compensation notwithstanding inflation." *Payne v. Sullivan*, 977 F.2d 900, 903 (4th Cir. 1992). In making a cost of living adjustment, the court may calculate the increase using the Consumer Price Index ("CPI-U").[5] *See Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 194 (2d Cir. 2000) ("[T]he district court may choose to apply a cost of living adjustment to [the statutory rate], as measured by the Consumer Price Index.").

Here, the court calculates adjustments to EAJA fees using the CPI-U data for the Northeast Urban Area, available from the Bureau of Labor Statistics, for the periods in which the services were performed: the second half of 2008, all of 2009, and 2010. *See Kerin*, 218 F.3d at 194 ("[T]he hourly rate . . . should only be increased by the corresponding Consumer Price Index for each year in which the legal

[5] "CPI-U" refers to the Consumer Price Index data for "All Urban Consumers." Consumer Price Index, U.S. Bureau of Lab. Stats., http://www.bls.gov/cpi/tables.htm (last visited Sept. 20,2011).

work was performed." (internal citation omitted)). To calculate the EAJA fee adjustment, the court makes an adjustment to the $125 statutory EAJA amount. *See Allegheny Bradford Corp. v. United States*, 28 CIT 2107, 2114, 350 F. Supp. 2d 1332, 1339 (2004); 28 U.S.C. § 2412(d)(2)(A)(ii). The adjustment is calculated as follows: the statutory hourly rate ($125) is multiplied by the applicable CPI-U for the time period, divided by the CPI-U for March 1996 when the EAJA statutory cap went into effect.

Accordingly, the adjusted EAJA fee rate for 2008 is $177.15 ($125 x 230.723/162.8). The adjusted rate for 2009 is $181.83 ($125 x 236.825/162.8). The adjusted rate for 2010 is $184.32 ($125 x 240.059/162.8).

D. Calculation

The court must next consider the number of hours requested in the EAJA application. As noted, plaintiff's itemized statement includes (1) 671 hours of attorneys' time; (2) 19.1 hours of paralegals' time; and (3)other costs and expenses totaling $2,850.16. Pl.'s Decl. in Supp. of Appl., Ex. A.

Plaintiff has therefore requested reimbursement for 19.1 hours of paralegal time. Although "the EAJA makes no explicit provision for law clerk 'fees,'" *Nakamura*, 17 CIT at 122; *see also Masias v. Sec'y of Health & Human Servs.*, 634 F.3d 1283, 1288 (Fed. Cir. 2011), the Supreme Court has determined that "a prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). Here, plaintiff's request for paralegal time is billed at various hourly rates, ranging from $100 to $175, which plaintiff has affirmed is "well within the range of prevailing market rates for a specialized practice area like customs litigation." Pl.'s Decl. in Supp. of Appl. 4–5 ¶ 11. As there is no indication that these rates are not the norm and because defendants have not challenged them, they will be used to calculate the reimbursement amount for paralegal services.

Finally, while the defendants oppose the awarding of attorney fees to plaintiff generally, they have not challenged any specific portion of plaintiff's claim or any item included on plaintiff's statement. Defs.' Mem. 28–29. Additionally, defendants have not challenged the reasonableness of any of the additional costs and expenses, totaling $2,850.16, itemized by plaintiff.

Because defendants have failed to object to any specific cost or set of hours billed by plaintiff, and have not asked the court to exclude any charged items, all of the hours provided by plaintiff will be used to calculate the total reimbursement award according to the calculations displayed in the table below. Plaintiff, however, has not provided an annual breakdown of attorneys' hours so that the CPI-U adjusted hourly rate can be applied to yield a cost-of-living-adjusted fee rate for the second half of 2008, all of 2009, and 2010. As a result, plaintiff is directed to prepare a revised EAJA application detailing the eligible attorneys' hours by year, excluding hours for paralegal services, so that the court may determine the proper EAJA award.

Item	**Rate**	**Calculation**	**Total**
Attorney's Fees (2008)	2008 CPI-U Adjusted Rate: $177.15 ($125 x 230.723/162.8)	$177.15 x ___ Hours	**$ ____**
Attorney's Fees (2009)	2009 CPI-U Adjusted Rate: $181.83 ($125 x 236.825/162.8)	$181.83 x ___ Hours	**$ ____**
Attorney's Fees (2010)	2009 CPI-U Adjusted Rate: $184.32 ($125 x 240.059/162.8)	$184.32 x ___ Hours	**$ ____**
Paralegal Services	Prevailing Market Rate As Determined by Plaintiff	19.1 Hours x Prevailing Market Rate ($100 to $175 per hour)	**$1,833.00**
Costs			**$2,850.16**
		TOTAL	**$________**

CONCLUSION

For the reasons set forth above, plaintiff's application for fees and other expenses pursuant to the EAJA is GRANTED. Accordingly, it is hereby

ORDERED that plaintiff provide a yearly breakdown of attorneys fees (excluding paralegal services) by November 16, 2011.

Dated: October 17, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–129

NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, NTN BOWER CORPORATION, AMERICAN NTN BEARING MANUFACTURING CORP., NTN-BCA CORPORATION, AND NTN DRIVESHAFT, INC., Plaintiffs, and JTEKT CORPORATION, AND KOYO CORPORATION OF U.S.A., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00286

[Granting plaintiffs' motion for leave to amend the complaint.]

Dated: October 17, 2011

Kevin Michael O'Brien, *Christine M. Streatfeild*, *Kevin J. Sullivan* and *Steven Michael Chasin*, Baker & McKenzie, LLP, of Washington, DC, and *Diane Alexa MacDonald*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs.

Neil R. Ellis, *Jill Caiazzo*, *Lawrence R. Walders* and *Rajib Pal*, Sidley Austin, LLP, of Washington, DC, for plaintiff-intervenors.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Patricia M. McCarthy*, Assistant Director.

Geert M. De Prest, *Terence P. Stewart*, *Lane S. Hurewitz* and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

Introduction

In this action, plaintiffs NTN Bearing Corporation of America, NTN Corporation, NTN Bower Corporation, American NTN Bearing Manufacturing Corp., NTNBCA Corporation, and NTN Driveshaft, Inc. (collectively "NTN" or "plaintiffs") contest the final determination issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), to conclude a set of administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom and the Department's decision to issue liquidation instructions to U.S. Customs and Border Protection fifteen days after the issuance of the Final Results. Compl. ¶¶ 19–34, *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part,* 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("*Final Results*").

Defendant moved to dismiss the third count in NTN's complaint, in which NTN claimed that Commerce may have made "programming, clerical, or methodological errors that can only be determined by reference to the confidential administrative record." Compl. ¶ 34, Def.'s Mot. to Dismiss (Nov. 22, 2010), ECF 39. Plaintiffs moved to amend their complaint to restate the claim in the third count, seeking to claim that an error actually occurred when Commerce calculated NTN's credit expenses using incorrect data that NTN, in response to a request by Commerce, subsequently updated and that "included revised dates of payment for sales transactions for which NTN received payment between the original questionnaire response and the supplemental questionnaire response." Pls.' Mot. for Leave to Amend the Compl. & Proposed Amended Compl. ¶ 34 (Feb. 1, 2011), ECF 54. Defendant and Defendant-intervenor oppose, on the ground of futility, plaintiffs' motion to amend the complaint, arguing that NTN could have, but did not, present to the Department during the administrative reviews its objection to the alleged error and thereby failed to exhaust its administrative remedies. Def.'s Opp. to Pls.' Mot. for Leave to Amend (Feb. 22, 2011), ECF 59; Timken's Opp. To NTN's Mot. for Leave to Amend Compl. (Feb. 22, 2011), ECF 60.

As directed by USCIT Rule 15(a)(2), "[t]he court should freely give leave" to amend a pleading "when justice so requires." Allowing or denying a motion to amend the complaint is within the sound discretion of the court, and in exercising that discretion, a court may consider, *inter alia*, whether the amendment sought would be futile and whether allowing leave to amend would prejudice the other parties to the case. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"); *see also Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990); 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1487, at 701 (3d ed. 2010). Denying relief on a claim for failure to exhaust administrative remedies is also a matter for the court's discretion, *see* 28 U.S.C. § 2637(d) (2006), and the court may consider whether an exception to the requirement to exhaust administrative remedies applies on the particular facts.[1] In exercising that discretion, the court concludes

[1] Recognized as exceptions to exhaustion requirement are situations in which: (1) the argument is based on pure question of law, (2) there has been a lack of timely access to the confidential record, (3) a judicial decision rendered subsequent to the administrative determination materially affecting the issue, and (4) raising the argument before the agency would have been futile. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT __, __, 601 F. Supp. 2d 1370, 1377 (2009).

that it is appropriate to allow the amendment without reaching the issue of whether relief on the new claim would be precluded by the exhaustion requirement. In this way, both the court and the parties will have resort to the administrative record as it may relate to the exhaustion issue and any exceptions. Accordingly, the court need not, and does not, conclude at this time that the amendment to the complaint would be futile. Moreover, the court discerns no prejudice to the other parties that would result from allowing the amendment. All parties will have the full opportunity to address the exhaustion issue, as well as the other issues in this case, in the briefing required by USCIT Rule 56.2.

For the above-stated reasons, the court will grant plaintiffs' motion for leave to amend the complaint.

ORDER

Upon consideration of defendant's motion to dismiss, plaintiffs' response, defendant's reply, plaintiffs' motion for leave to amend the complaint, defendant and defendant-intervenor's opposition, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiffs' motion to amend the complaint be, and hereby is, GRANTED; it is further

ORDERED that plaintiffs' amended complaint, as submitted on February 1, 2011, is deemed filed; it is further

ORDERED that defendant's motion to dismiss, as filed November 22, 2010, be, and hereby is, denied as moot; it is further

ORDERED that plaintiffs' motion for oral argument on the motion to dismiss, as filed on February 24, 2011, be, and hereby is, denied as moot; and it is further

ORDERED that, pursuant to the joint status report filed January 26, 2011, motions for judgment on the agency record shall be filed within 60 days of the date of issuance of this Opinion and Order, response briefs shall be filed 60 days after the service of briefs in support of motions for judgment on the agency record, and reply briefs shall be filed within 30 days of the service of the response briefs.

Dated: October 17, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 11–130

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, Defendants.

Before: WALLACH, Judge
Court No.: 09–00375

[Defendants' Motion to Dismiss is DENIED.]

Dated: October 18, 2011

Baker & Hostetler LLP (*Matthew W. Caligur* and *C. Thomas Kruse*) and *Paulsen K. Vandevert*, Of Counsel, for Plaintiff Ford Motor Company.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, U.S. Department of Justice (*Justin R. Miller* and *David S. Silverbrand*); and *Yelena Slepak*, U.S. Customs and Border Protection, for Defendants United States, U.S. Department of Homeland Security, and U.S. Customs and Border Protection.

OPINION

Wallach, Judge:

I
Introduction

Defendants United States of America, U.S. Department of Homeland Security, and U.S. Customs and Border Protection move to dismiss Plaintiff Ford Motor Company's Second Amended Complaint for lack of subject matter jurisdiction. Defendants' Motion to Dismiss, Doc. No. 74 ("Defendants' Motion"); Defendants' Memorandum of Support of Its Motion to Dismiss, Doc. No. 74 at 9–25 ("Defendants' Memo"). Because Plaintiff's claims are ripe and within the court's 28 U.S.C. § 1581(i) jurisdiction, Defendants' Motion is DENIED.

II
Background

A "drawback" is a refund of duties paid on an import that has been exported or destroyed, 19 U.S.C. § 1313; 19 C.F.R. § 191.2(i)-(k); a "drawback entry" is the form filed by a claimant to request a drawback payment, 19 C.F.R. § 191.2(j).[1] Customs finalizes that payment through "liquidation" of the drawback entry. 19 C.F.R. §§ 159.1,

[1] A "drawback entry" forms only part of a "drawback claim." 19 C.F.R. § 191.2(j)-(k). However, "[t]hese terms are often used interchangeably by claimants and Customs." Defendants' Memo at 4 n.2; *see also* 19 U.S.C. § 1504(a)(2) ("Entries or claims for drawback").

191.81.[2] In some circumstances, Customs pays the claimant the estimated drawback before it liquidates the drawback entry. 19 C.F.R. § 191.92. Subject to certain exceptions, entries that are not affirmatively liquidated by Customs in a timely manner are "deemed liquidated" by operation of law at the amount originally asserted by the claimant. 19 U.S.C. § 1504(a)(2)(A). If Customs determines that it has overpaid on a drawback entry that has already liquidated (whether affirmatively or by operation of law), it normally cannot recover the difference from the claimant. *See* 19 U.S.C. §§ 1514(a), 1520(a)(4); *United States v. Nat'l Semiconductor Corp.*, 30 CIT 769, 774 (2006).

For the deemed liquidation of drawback entries, Congress enacted the current 19 U.S.C. § 1504(a)(2) as part of the Miscellaneous Trade and Technical Corrections Act of 2004. *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. 108–429, §1563, 118 Stat. 2434 (2004). Although Plaintiff and Defendants disagree on the proper interpretation of this provision, *see* Second Amended Complaint for Injunctive and Declaratory Relief, Doc. No. 38 at 7–10 ("Second Amended Complaint"); Defendants' Memo at 2–4, resolution of Defendants' Motion does not depend on the substance of that disagreement.[3]

---

[2] Customs also liquidates entries for the underlying imports, which are known as import entries or consumption entries. 19 C.F.R. §§ 159.1; 191.81.

[3] 19 U.S.C. § 1504(a)(2) provides as follows:

(2) Entries or claims for drawback

> (A) In general
>
> Except as provided in subparagraph (B) or (C), unless an entry or claim for drawback is extended under [19 U.S.C. § 1504(b)] or suspended as required by statute or court order, an entry or claim for drawback not liquidated within 1 year from the date of entry or claim shall be deemed liquidated at the drawback amount asserted by the claimant at the time of entry or claim. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.
>
> (B) Unliquidated imports
>
> An entry or claim for drawback whose designated or identified import entries have not been liquidated and become final within the 1-year period described in subparagraph (A), or within the 1-year period described in subparagraph (C), shall be deemed liquidated upon the deposit of estimated duties on the unliquidated imported merchandise, and upon the filing with the Customs Service of a written request for the liquidation of the drawback entry or claim. Such a request must include a waiver of any right to payment or refund under other provisions of law. The Secretary of the Treasury shall prescribe any necessary regulations for the purpose of administering this subparagraph.
>
> (C) Exception
>
> An entry or claim for drawback filed before [December 3, 2004], the liquidation of which is not final as of [December 3, 2004], shall be deemed liquidated on the date that is 1 year after [December 3, 2004], at the drawback amount asserted by the claimant at the time of the entry or claim.

19 U.S.C. § 1504(a)(2).

The instant action includes all drawback entries that Plaintiff filed prior to December 3, 2004 and that Customs had not affirmatively liquidated when the action commenced on September 2, 2009. *See* Second Amended Complaint, Doc. No. 38 at 2–3; *id.*, Ex. A; Plaintiff's Consent Motion to Sever Liquidated Drawback Claims, Doc. No. 65 at 3; Summons, Doc. No. 1 at 1; Defendants' Memo at 5–6. The 17 drawback entries specifically identified by Plaintiff were all filed between 1996 and either 1997 or 1998. Second Amended Complaint at 6. Plaintiff argues that all of these entries are now deemed liquidated. *Id.* at 3. Accordingly:

> [P]ursuant to 28 U.S.C. § 1581(i), 5 U.S.C. § 706, 28 U.S.C. § 2643(c)(1), and 28 U.S.C. § 2201, Ford seeks a declaratory judgment from the Court that (1) the Drawback Claims have been deemed liquidated by operation of law pursuant to 19 U.S.C. § 1504(a)(2); (2) Customs has no legal authority to review and/or affirmatively liquidate any drawback claims that have been deemed liquidated by operation of law; and (3) any action by Customs to review and/or affirmatively liquidate drawback claims that have been deemed liquidated by operation of law is [unlawful]. . . . Ford also seeks a permanent injunction enjoining Customs from (1) reviewing and/or affirmatively liquidating these Drawback Claims; (2) taking any action adverse or detrimental to Ford relating to these Drawback Claims; and (3) restraining Customs from taking any steps or actions to collect additional duties from Ford any amounts relating to these Drawback Claims, and taking any actions adverse to Ford in respect of these Drawback Claims, including, but not limited to placing Ford on national sanctions.

Id. at 3–4.

Although Defendants do not explicitly state whether they believe any of these drawback claims are deemed liquidated, *see generally* Defendants' Memo; Defendants' Reply Memorandum in Support of Its Motion to Dismiss, Doc. No. 117 ("Defendants' Reply"), they do note that "Customs is actively liquidating" certain drawback entries filed by Plaintiff, Defendants' Memo at 5. Indeed, after Plaintiff commenced this action, Customs affirmatively liquidated five of the drawback entries included in it. *See* Second Amended Complaint at 3, 15; *id.*, Ex. A at 1; Defendants' Memo at 6, 23.

Defendants now move to dismiss this action, arguing that (1) Plaintiff's claims with respect to the 12 drawback entries that have not been affirmatively liquidated present no justiciable case or controversy and remain unripe and that (2) the court's jurisdiction under 28 U.S.C. § 1581(i) does not extend to any of the 17 drawback entries. Defendants' Memo at 9–25.

III
Standard of Review

In deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).[4] When the court's jurisdiction is challenged, "[t]he party seeking to invoke . . . jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Emps. of Sonoco Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)).

IV
Discussion

Plaintiff challenges Customs' authority to act with respect to the drawback entries at issue. *See infra* Part IV.A. That challenge presents a case or controversy that is both ripe, *see infra* Part IV.B, and within the court's 28 U.S.C. § 1581(i) jurisdiction, *see infra* Parts IV.C-D.

A
Plaintiff Challenges Customs' Authority To Act

Plaintiff asks this court to declare that Customs lacks the statutory authority to act, and to accordingly enjoin Customs from acting, with regard to any of the drawback claims at issue. *See* Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, Doc. No. 114 at 1–2 ("Plaintiff's Response") ("The purpose of Ford's suit . . . is to obtain declaratory judgment that Customs has no legal authority to review, liquidate, or take any action with respect to the Drawback

[4] Plaintiff incorrectly implies that this rule extends to its *legal* arguments. *See* Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, Doc. No. 114 at 9 ("Plaintiff's Response") ("The only facts before the Court are the well-pled facts contained in Ford's Second Amended Complaint that Customs' legal interpretation of § 1504 is deeply flawed. In deciding the motion to dismiss, the Court should assume the truth of all well-pled factual allegations, and should construe that [sic] all reasonable inferences in Ford's favor."), 15 ("Customs is ignoring the clear Congressional mandate to bring final resolution to aging drawback claims. . . . In some instances, Customs has affirmatively liquidated aging drawback claims and issued duty bills to Ford, ignoring the fact that 19 U.S.C. § 1504 provides that the aging drawback claims have been deemed liquidated by operation of law at the value claimed by the importer at the time of entry. Under these facts, which must be taken as true, Ford's declaratory judgment action is ripe for review.").

Claims, other than to recognize their proper status as finally liquidated at the amounts claimed by Ford."); Second Amended Complaint at 2 ("Customs is without legal authority to review and/or liquidate [these] drawback claims"), 3–4 (seeking injunctive and declaratory relief), 24–25 (same).

Plaintiff's essential challenge is therefore to the existence, rather than to the exercise, of Customs' authority over these drawback claims. *See* Plaintiff's Response at 15 ("Customs' improper actions deprive Ford of its fundamental due process rights by requiring Ford to participate in a statutorily barred and unlawful process in which the Drawback Claims that have been deemed finally liquidated by operation of law are reopened and reassessed."), 21 ("Ford is challenging the legality and constitutionality of Customs taking any action at all on [these drawback claims], including requiring Ford to verify the correctness of the claims, protest liquidations of certain [of these claims], and then to challenge Customs' actions where Customs' unlawful 'decisions' were adverse to Ford."); Ford's Sur-Reply in Opposition to Defendants' Motion to Dismiss and Brief in Support, Doc. No. 46 at 2 ("Plaintiff's Sur-reply") ("Customs is currently and actively engaged in a systematic review of the Drawback Claims, despite its lack of any legal authority to conduct such a review.).[5] Indeed, Plaintiff argues that Customs was and is *legally unable* to even reach a protestable decision with respect to any of these drawback claims. *Plaintiff's Response* at 4–5 (citing *Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371 (CIT 2008), *aff'd* 594 F.3d 1346 (Fed. Cir. 2010)).[6]

B
Plaintiff's Challenge Presents A Case Or Controversy That Is Ripe

Defendants argue that Plaintiff's challenge with respect to the drawback claims that Customs has not affirmatively liquidated does not present a "case or controversy" and is not ripe. Defendants' Memo at 10–14.

An action for declaratory judgment presents a "case or controversy" if "the facts alleged, under all the circumstances, show that there is a

[5] Plaintiff's Sur-reply pertains to an earlier motion to dismiss filed by Defendants and denied without prejudice by the court. *See* Plaintiff's Sur-reply; April 20, 2010 Order, Doc. No. 63.

[6] The court need not and does not reach the merits of this argument. However, even if Customs lacked authority over the entries, its "decision to liquidate certain entries anew after the entries had already been deemed liquidated is a protestable decision under 19 U.S.C. § 1514(a)(5)." *Fujitsu Gen. Am., Inc. v. United States*, 24 CIT 733, 739, 110 F. Supp. 2d 1061 (2000) (citing *Pagoda Trading Corp. v. United States*, 804 F.2d 665, 668 (Fed. Cir. 1986)).

substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [that] declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)). The court's "analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* at 128–29.

Even if a case or controversy exists, "injunctive and declaratory judgment remedies . . . are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution, . . . that is to say, unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties." *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993) (quoting in part *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)) (internal quotations omitted); *see also Ford Motor Co. v. United States*, 716 F. Supp. 2d 1302, 1313–14 (CIT 2010).

Although Defendants believe that Plaintiff "cannot demonstrate a concrete or definite harm . . . until Customs actively liquidates" the drawback entries at issue, Defendants' Memo at 11, the Congress that amended 19 U.S.C. § 1504 recognized that an importer is harmed if "for an open-ended time period [its drawback] claim unfairly remains subject to challenge by U.S. Customs," S. Rep. No. 108–28 at 172 (2003), *quoted in* Second Amended Complaint at 7. The pre-amendment statute's lack of a timeframe for liquidation of drawback entries "create[d] an *unwarranted liability* and the possibility that the claimant [would] have to reimburse the U.S. Treasury any drawback monies paid to the claimant—even several years from when the claim was actually made and the money was paid to the drawback claimant." S. Rep. No. 108–28 at 172–73 (2003) (emphasis added), *quoted in* Second Amended Complaint at 7. Congress intended that its changes to 19 U.S.C. § 1504 "would remove such liability overhanging drawback claimants." S. Rep. No. 108–28 at 173, *quoted in* Second Amended Complaint at 7–8.

On the assumption that Plaintiff's "well-pled factual allegations are true," *Islip*, 22 CIT at 854, the court infers, for the purpose of deciding Defendants' Motion, that Plaintiff has suffered the kind of harm described by Congress. *Compare* Second Amended Complaint at 6, 9–12 *with* S. Rep. No. 108–28 at 172–73. Because Customs asserts authority over the drawback entries at issue, Plaintiff continues to face liabilities of uncertain magnitude and duration. Some of these drawback entries are nearly 15 years old. Second Amended Complaint at 6. Plaintiff disposed of its pertinent records after maintaining them "for the three year period . . . required by the statute and Customs' regulation," *id.*, and Customs has indicated that "no documents or records relating to either the Ford drawback claims or the underlying consumption entries are available due to their age," *id.* at 12. Nonetheless, after "not communicat[ing] with Ford in any way with respect to either the Drawback Claims or the underlying consumption entries" for nine years, *id.* at 6, Customs began soliciting information from Plaintiff in 2008, *see* Second Amended Complaint at 9–10 (alleging that Customs "directed Ford to review" and as necessary amend certain drawback entries), 11–12 (alleging that "Customs asked Ford to provide . . . information and records" that Customs believed "related to some, if not all, of" the drawback entries). These allegations, if true, demonstrate an immediate, real, and substantial controversy, *MedImmune*, 549 U.S. at 127, "the effects of [which] have been 'felt in a concrete way'" by Plaintiff, *Reno*, 509 U.S. at 57 (quoting *Abbot Laboratories*, 387 U.S. at 148–49).[7]

C
The Court Has Jurisdiction Under 28 U.S.C. § 1581(i) To Hear Plaintiff's Claims

Defendants argue that the court lacks jurisdiction under 28 U.S.C. § 1581(i) because Plaintiff "has an available and adequate remedy under 28 U.S.C. § 1581(a)." Defendants' Memo at 9. Defendants make this argument with respect to all the drawback entries at issue—that is, both those that have been affirmatively liquidated, *see id.* at 14–22, and those that have not, *see id.* at 23–25.

This court has previously identified three jurisdictional bases under which an importer can make a deemed liquidation argument.[8]

[7] The inference, for the purpose of deciding Defendants' Motion, that Plaintiff was harmed does not imply that Customs' actions were unlawful.

[8] Although the cases discussed in this paragraph involve consumption entries rather than drawback entries, the court discerns no reason why this would affect the jurisdictional analysis. *Compare* 19 U.S.C. § 1504(a)(1) *with id.* § 1504(a)(2); *cf.* S. Rep. No. 108–28 at 173 (2003) ("This change would remove such liability overhanging drawback claimants by requiring U.S. Customs (1) to liquidate existing drawback claims, and (2) to liquidate future drawback claims within a specified period of time, as U.S. Customs already does for merchandise entered for consumption.").

First, the importer can wait for Customs to affirmatively liquidate, protest the liquidation under 19 U.S.C. § 1514, and then, if Customs denies the protest, challenge that denial under 28 U.S.C. § 1581(a). *Fujitsu Gen. Am., Inc. v. United States*, 24 CIT 733, 744–45, 110 F. Supp. 2d 1061 (2000) (holding that an importer that failed to protest an affirmative liquidation cannot bring the same challenge under 28 U.S.C. § 1581(i)), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002). Second, the importer can wait for Customs to affirmatively liquidate, decline to pay whatever amount it is billed, and then assert an affirmative defense of deemed liquidation if the United States brings an enforcement action under 28 U.S.C. § 1582. *Id.* at 743–44 (citing *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1560 (Fed. Cir. 1997)). Third, the importer need not wait at all: As long as Customs has yet to affirmatively liquidate, the importer can bring an action under 28 U.S.C. § 1581(i) to obtain "a declaratory judgment from the CIT confirming that there was a deemed liquidation." *Ford Motor*, 716 F. Supp. 2d at 1312 (quoting *Fujistu*, 24 CIT at 739)[9]; *see also Fujitsu*, 24 CIT at 745 n.11; 28 U.S.C. § 2201 (declaratory relief).

Although the instant action follows this third jurisdictional path, *see* Second Amended Complaint at 3–4; Plaintiff's Response at 12, Defendants nonetheless argue that "[i]f the Court were to . . . allow Ford to proceed in the context of section 1581(i), it would be allowing Ford to circumvent the jurisdictional scheme of section 1581," Defendants' Memo at 21. According to Defendants:

> Ford can bring about the liquidation of its drawback entries by depositing estimated duties on the unliquidated imported merchandise and filing a written request with Customs for the liquidation of the drawback entry or claim. 19 U.S.C. § 1504(a)(2)(B). Once the drawback entries are liquidated pursuant to this framework, Ford can protest the liquidation, and if necessary, commence an action pursuant to 28 U.S.C. § 1581(a). Thus, unlike *Fujitsu*, seeking a declaratory judgment in the context of section 1581(i) is not Ford's only remedy.

Id. at 20; *see also id.* at 14–15 (citing 19 U.S.C. § 1504(a)(2)(B) and 19 C.F.R. § 19.81(a)-(c)).

The Federal Circuit has "consistently held that to prevent circumvention of the administrative processes crafted by Congress, jurisdiction under [28 U.S.C. § 1581(i)] may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292

[9] *But see* infra Part IV.D.

(Fed. Cir. 2006) (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2008)). "Mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *Int'l Custom Prods.*, 467 F.3d at 1327 (quoting *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987) (citing *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1550 (Fed. Cir. 1983))).[10]

Defendants are correct that a declaratory judgment is not the only remedy that is conceivably available to Plaintiff: Like the importer in *Fujitsu*, Plaintiff could have waited for Customs to affirmatively liquidate the entries at issue or waited even longer for the United States to bring enforcement actions. *See Fujitsu*, 24 CIT at 745. However, neither of these conditional remedies is ultimately available or sufficient to redress the particular harms alleged by Plaintiff.

Critically, requiring Plaintiff to await affirmative liquidations or enforcement actions could extend the "unwarranted liability" that Congress sought to eliminate when it amended 19 U.S.C. § 1504 in 2004. S. Rep. No. 108–28 at 172–73 (2003), *quoted in* Second Amended Complaint at 7; *see supra* Part IV.B. Indeed, the Federal Circuit anticipated this Congressional desire to provide certainty and finality when it decided *Cherry Hill* in 1997. *See Cherry Hill*, 112 F.3d at 1560. Despite "the general rule that, without timely protest, all liquidations, whether legal or not, become final and conclusive under 19 U.S.C. § 1514," *Fujitsu*, 24 CIT at 743, the Federal Circuit held that "an importer need not protest a purported liquidation by Customs 'in order to be entitled to defend against liability on the ground of the deemed liquidation,'" *id.* at 744 (quoting *Cherry Hill*, 112 F.3d at 1560). Without this exception:

> There would be nothing, in theory, that would prevent Customs from conducting multiple successive liquidations of the same

[10] The court expressly rejects Plaintiff's argument that because "[t]he presence or absence of jurisdiction is determined on the facts existing at the time the complaint under consideration was filed," "[t]he fact that Ford conceivably could bring a future action under 28 U.S.C. § 1581(a) is irrelevant." Plaintiff's Response at 19 (citing *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993)). Under 28 U.S.C. § 1581, a jurisdictional basis is "available" if a party can ultimately invoke it by complying with the procedural requirements particular to it. *Cf. Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) ("[The limitation on 28 U.S.C. § 1581(i) jurisdiction] preserves the congressionally mandated procedures and safeguards . . . provided in the other subsections, . . . absent which litigants could ignore the precepts of subsections (a)-(h) and immediately file suit in the Court of International Trade under subsection (i)." (internal citations omitted)). However, in certain circumstances, these procedural requirements can render a basis manifestly inadequate. *See, e.g.*, *United States Cane Sugar Refiners'Ass'n v. Block*, 69 C.C.P.A. 172, 175 n.5, 683 F.2d 399 (CCPA 1982) ("The delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i)."); *infra* Part IV.C.

> entry and requiring the importer or surety to assume the burdens of protesting each one. Likewise, Customs could purport to liquidate an entry anew, years after the first liquidation had become final, and thereby impose liability on the importer or surety if the importer or surety were not vigilant in watching for notice of such untimely liquidations or if it were no longer able to undertake the burden of filing and pursuing a protest.
>
> The potential for abuse from a rule requiring protests in such cases is sufficiently plain that we think it unlikely that Congress would have intended the protest requirement to apply so broadly.

Cherry Hill, 112 F.3d at 1560, *quoted in Fujitsu*, 24 CIT at 744.[11]

Plaintiff's allegations also suggest a "potential for abuse" that only a declaratory judgment could prevent. *See generally* Second Amended Complaint at 9–15. For example, several months before Plaintiff commenced the instant action in September 2009, *see* Summons, Doc. No. 1, Customs affirmatively liquidated certain drawback entries from 1996–97, *see* Second Amended Complaint at 12, 13.[12] According to Plaintiff, "Customs did not give or transmit notice of these liquidations, as required by 19 U.S.C. § 1500(e). In fact, Ford learned of Customs' liquidation of these drawback claims only when it received the duty bills." *Id.* at 12. Customs denied Plaintiff's subsequent protest, *id.* at 13, and warned that nonpayment of the duty bills would result in the actual or functional imposition of "national sanctions" on Plaintiff, *id.* at 14.[13] After ultimately "conclud[ing] that it had no reasonable alternative," *id.*, Plaintiff "paid the amounts assessed on [these] Drawback Claims plus interest accrued to date," *id.* at 15, even though it believed that the entries had actually liquidated several years prior, *id.* at 10, 11.

With respect to the entries included in the instant action, Plaintiff correctly notes that it "has followed precisely the instructions promulgated by this Court regarding how to preserve and pursue judicial

[11] Although a declaratory judgment action is different than an enforcement action, *see Fujitsu*, 283 F.3d at 1375–76, the Federal Circuit's rationale in *Cherry Hill* is instructive, *see Fujitsu*, 24 CIT at 745.

[12] These entries are not included in the instant action. *See* Second Amended Complaint at 4, 13; Plaintiff's Consent Motion to Sever Liquidated Drawback Claims, Doc. No. 65 at 3 ("As [certain listed] drawback claims were liquidated prior to filing, Ford agrees that the Court lacks jurisdiction under 28 U.S.C. § 1581(i) over them.").

[13] According to Plaintiff, unlike the normal procedure, importers subject to national sanctions are "required to file the entry release and the entry summary, and [are] also required to pay estimated duties all at the time of initial importation." Second Amended Complaint at 14.

review where a party seeks judicial confirmation of deemed liquidation." Plaintiff's Response at 12. Regardless of whether Plaintiff is ultimately entitled to declaratory judgment in its favor, it is entitled to judicial review under 28 U.S.C. § 1581(i). *Fujitsu*, 24 CIT at 739, 745 n.11; *cf. Ford Motor*, 716 F. Supp. 2d at 1312.

D
All Entries At Issue Remain Within The Court's 28 U.S.C. § 1581(i) Jurisdiction

The judicial review to which Plaintiff is entitled extends to *all* drawback entries that are currently at issue in this action, including the five entries that Customs affirmatively liquidated after the action commenced. Defendants argue that because Plaintiff protested those liquidations and then "commenced a separate action pursuant [to] 28 U.S.C. § 1581(a)," Defendants' Memo at 23 (referencing Court No. 10–00142), "there can be no dispute that section 1581(a) is available to Ford for these . . . entries, and Ford has not demonstrated why proceeding forward with these five claims in the context of Court No. 10–00142 would be manifestly inadequate," *id.* In support of this argument, Defendants cite *Ford Motor*, 716 F. Supp. 2d at 1312–13, as well as *Ford Motor Co. v. United States*, 751 F. Supp. 2d 1316, 1317–18 (CIT 2010) (denying Plaintiff's motion for reconsideration of *Ford Motor*, 716 F. Supp. 2d 1302). Defendants' Reply at 11–12.[14]

In *Ford Motor*, this court held that its jurisdiction under 28 U.S.C. § 1581(i) included entries that were not affirmatively liquidated but excluded entries that were affirmatively liquidated, even though those liquidations occurred after the action commenced. *Compare Ford Motor*, 716 F. Supp. 2d at 1312, *with id.* at 1310.[15] While Plaintiff's arguments in that case may have been "erroneous[]," *Ford Motor*, 751 F. Supp. 2d at 1317, the court does not reach a similar conclusion in the instant action.

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[14] Defendants also express understandable "surpris[e]" that Plaintiff's Response fails to address these critical portions of *Ford Motor*, 716 F. Supp. 2d at 1310. Defendants' Reply at 10 n.7.

[15] The court in *Ford Motor* also declined to issue a temporary restraining order, preliminary injunction, and declaratory judgment regarding the entries over which it found jurisdiction, *Ford Motor*, 716 F. Supp. 2d at 1312–14, reasoning in part that "Plaintiff will be able to obtain meaningful judicial review over all legitimate legal claims pertaining to" those entries by waiting for their liquidation, following "all procedural prerequisites," and ultimately bringing an action under 28 U.S.C. § 1581(a), *id.* at 1314. In the instant action, the court also declined to issue a preliminary injunction, *see* October 20, 2009 Order, Doc. No. 36 at 2, and has not had occasion to decide whether to issue the declaratory judgment that Plaintiff seeks.

"Jurisdiction over Customs' actions is measured at the time the summons is filed. Once entries are properly before the Court, Customs is powerless to exert authority over these entries in the absence of a Court order." *Washington Int'l Ins. Co. v. United States*, 25 CIT 207, 218, 138 F. Supp. 2d 1314 (2001). This follows from "the long-standing rule in the Federal courts that jurisdiction is determined at the time the suit is filed and, after vesting, cannot be ousted by subsequent events, including action by the parties." *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 293, 58 S. Ct. 586, 82 L. Ed. 845 (1938); *Rosado v. Wyman*, 397 U.S. 397, 402, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970); *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959); *Hill v. Rolleri*, 615 F.2d 886 (9th Cir. 1980); *Craft v. United States*, 218 Ct. Cl. 579, 589 F.2d 1057 (Ct. Cl. 1978)), *cited in Washington Int'l*, 25 CIT at 218.[16]

When Plaintiff commenced the instant action, 28 U.S.C. § 1581(i) jurisdiction existed over all relevant drawback entries that had yet to be affirmatively liquidated by Customs. *See supra* Part IV.C; *accord Ford Motor*, 716 F. Supp. 2d at 1312. Because the court had jurisdiction then, it has jurisdiction now; Customs' post-commencement liquidations neither preclude nor postpone the court's exercise of jurisdiction over the entries at issue.

V
Conclusion

For the reasons stated above, Defendants' Motion is DENIED.

Dated: October 18, 2011
New York, New York

/s/ Evan J. Wallach
Evan J. Wallach, Judge

Slip Op. 11–131

BASF Corp., Plaintiff, v. United States, Defendant.

Before: WALLACH, Judge
Court No.: 02–00558

[Plaintiff's Motion for Summary Judgment is DENIED.]

Dated: October 19, 2011

[16] Moreover, it is implausible that Congress intended to permit Customs to unilaterally terminate, at any point before judgment, an importer's otherwise viable action to obtain the certainty and finality that Customs had failed to timely provide. *See* S. Rep. No. 108–28 at 172–73.

Barnes, Richardson & Colburn (*Frederic D. Van Arnam, Jr.* and *Helena D. Sullivan*) for Plaintiff BASF Corp.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*); and *Edward N. Maurer* and *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
Introduction

The court again examines the principal use of certain imported beta-carotene products. This action involves classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of the following goods: Betavit® 10% and Betavit® 20% ("Betavits"). U.S. Customs and Border Protection ("Customs") classified these goods under HTSUS Heading 2106, which includes "food preparation not elsewhere specified or included." Plaintiff BASF Corp. ("Plaintiff" or "BASF") argues that these goods should instead be classified under HTSUS Subheading K3204, which includes "[b]eta-carotene and other carotenoid coloring matter," or, alternatively, under either HTSUS Heading 2936 as a "provitamin," or HTSUS Heading 3003, which includes "medicaments." Plaintiff also argues that beta-carotene used as a provitamin falls under the Pharmaceutical Appendix. Defendant United States ("Defendant") asserts these goods are classifiable under one of two other subheadings under HTSUS Heading 2106, subject to the sugar quota, or, alternatively, under another subheading of HTSUS Heading 3204.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Plaintiff seeks summary judgment in its favor. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"). Defendant opposes summary judgment and seeks trial. Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Opposition"). Because genuine issues of material fact affect the proper classification of Plaintiff's imported merchandise, Plaintiff's Motion for Summary Judgment is DENIED.

II
Background

A
Procedural History

This action covers the goods imported by Plaintiff between September 2000 and August 2000. Amended Summons, Doc. No. 7. Customs classified the goods under HTSUS Subheading 2106.90.99[.]98 and assessed duties at the rate of 6.4% *ad valorem*. *Id.*; Complaint, Doc. No. 16 ¶ 35; Amended Answer to Complaint, Doc. No. 24 ¶ 35 ("Answer"). Plaintiff timely filed its protest asking Customs to reclassify the goods under HTSUS subheading K3204.19.35. Amended Summons. The duty rate applicable to this subheading is Free. HTSUS subheading K3204.19.35.

After Customs denied the protest, Plaintiff initiated the instant action on August 16, 2002. *See* Summons, Doc. No. 1. On April 22, 2010, Plaintiff moved for summary judgment in its favor, Plaintiff's Motion, and on August 30, 2010, Defendant moved for denial of Plaintiff's Motion, Defendant's Opposition.

On December 23, 2010, the court issued *Roche Vitamins v. United States*, 750 F. Supp. 2d 1367 (CIT 2010), denying summary judgment in a similar case because of conflicting evidence as to the principal use of beta-carotene in the product at issue. *Roche Vitamins*, 750 F. Supp. 2d 1373. On January 11, 2011, the court ordered parties in the present case to submit supplemental briefing on "the effect of the court's opinion in *Roche Vitamins, Inc. v. United States*." Order, Doc. No. 77. Plaintiff and Defendant submitted supplemental briefs on March 16, 2011. Plaintiff's Supplemental Memorandum of Law Re: The Effect of the Court's Holding in *Roche Vitamins*, Doc. No. 84 ("Plaintiff's Supplemental Memo"); Defendant's Response to the Court's Order of January 11, 2011, Doc. No. 85 ("Defendant's Supplemental Memo").

B
Description Of The Imported Goods

Betavits are mixtures containing synthetic beta-carotene, which is a carotenoid. Plaintiff's Statement of Material Facts Not in Dispute, Doc. No. 44 ¶¶ 7–8 ("Plaintiff's Undisputed Facts"); Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute, Doc. No. 65 ¶¶ 7–8 ("Defendant's Response to Plaintiff's Undisputed Facts"). Beta-carotene is an organic coloring matter which imparts color in the spectrum of yellow to orange to red. Plaintiff's Undisputed Facts ¶ 9; Defendant's Response to Plaintiff's Undisputed Facts ¶ 9. Beta-carotene is also a provitamin A. Plaintiff's Undisputed Facts ¶ 10; Defendant's Response to Plaintiff's Undisputed Facts ¶ 10. Additionally, it is undisputed that beta-carotene is not water soluble; that as a pure crystal, it is pyrogenic, unstable, and prone to oxidative degradation and decomposition; and that when it oxidizes, its provitamin A activity and ability to color are destroyed.

Plaintiff's Undisputed Facts ¶¶ 11–13; Defendant's Response to Plaintiff's Undisputed Facts ¶¶ 11–13. As to the use of these products, both parties seem to agree that, at least in theory, these products can be used for effective coloration in food and beverages but that they were marketed for use not as a colorant but as a provitamin A in multivitamin tablets, capsules, and other vitamin products. Plaintiff's Undisputed Facts ¶¶ 28–30; Defendant's Response to Plaintiff's Undisputed Facts ¶¶ 28–30.

However, the parties seem to disagree as to the exact ingredients in these products, what the ingredients do, and how these products are made. *See generally* Plaintiff's Undisputed Facts; Defendant's Response to Plaintiff's Undisputed Facts.

III
Standard Of Review

In a classification case, "the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then" determines "the proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998).

The court will grant a motion for summary judgment "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Accordingly, summary judgment in a classification case is appropriate only if "the material facts of what the merchandise is and what it does are not at issue." *Diachem Indus. Ltd. v. United States*, 22 CIT 889, 893 (1998) (citation omitted). "The court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048 (1988) (citation omitted), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). Instead, it must view the evidence "in a light most favorable to the nonmovant" and draw "all reasonable inferences . . . in the nonmovant's favor." *Avia Grp. Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

The court determines the proper classification *de novo* by applying the HTSUS General Rules of Interpretation ("GRIs") and the HTSUS Additional U.S. Rules of Interpretation ("ARIs") in numerical order. *See Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed.

Cir. 1997).[1] GRI 1 provides in relevant part that "classification shall be determined according to the terms of the [HTSUS] headings and any relative section or chapter notes." GRI 1 (2000–2002). "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss*, 195 F.3d at 1379 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

"To assist it in ascertaining the common meaning of a tariff term, the court may rely on its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999) (citation omitted). Although not dispositive, the Explanatory Notes ("ENs") maintained by the Harmonized System Committee of the World Customs Organization do "clarify the scope of the HTSUS subheadings and offer guidance in their interpretation." *Franklin v. United States*, 289 F.3d 753, 758 (Fed. Cir. 2002) (citation omitted); *see* H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988) at 26–27, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

IV
Discussion

Classification of the Betavits under Heading 3204 depends on the resolution of genuine issues of material fact. *See infra* Part IV.A. Classification of the Betavits under an alternative heading also depends on the resolution of genuine issues of material fact. *See infra* Part IV.B.

A
Classification Of The Betavits Under Heading 3204 Depends On The Resolution of Genuine Issues Of Material Fact

1
Principal Use Analysis

HTSUS Heading 3204 and the relevant subheadings provide as follows:

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[1] Classification decisions made by Customs may be entitled to some weight in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See United States v. Mead Corp.*, 533 U.S. 218, 234–35, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Michael Simon Design, Inc. v. United States*, 30 CIT 1160, 1163, 452 F. Supp. 2d 1316 (2006).

3204	Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic coloring matter;
. . . .	
3204.19	Other, including mixtures of coloring matter of two or more of the subheadings 3204.11 to 3204.19:
. . . .	
3204.19.35	Beta-carotene and other carotenoid coloring matter
. . . .	

Heading 3204, HTSUS (2000). The court has previously held that the term "coloring matter" in Heading 3204 is a principle use provision. *E.M. Chems. v. United States*, 20 CIT 382, 386, 923 F. Supp. 202 (1996) (denying summary judgment because of conflicting evidence as to the principal use of thermochromic liquid crystals); *Roche Vitamins*, 750 F. Supp. 2d 1373 (denying summary judgment because of conflicting evidence as to the principal use of beta-carotene); *see also BASF Corp. v. United States* (*BASF I*), 29 CIT 681, 684, 391 F. Supp. 2d 1246 (2005) (classifying beta-carotene product under subheading 3204.19.35, emphasizing the purpose of the product), *aff'd*, *BASF Corp. v. United States* (*BASF II*), 482 F.3d 1324 (Fed. Cir. 2007).

Here, the court must conduct a "principal use" analysis, *i.e.*, "'ascertain the class or kind of goods which are involved and decide whether the subject merchandise is a member of that class.'" *Roche Vitamins*, 750 F. Supp. 2d at 1374 (quoting *E.M. Chems.*, 20 CIT at 388). "The purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999). The Federal Circuit describes ARI 1(a) as "call[ing] for a determination as to the group of goods that are commercially fungible with the imported goods." *Id.* at 1365. Traditionally, courts undertaking the principal use analysis examine multiple factors that include:

(1) the general physical characteristics of the merchandise;

(2) the expectation of the ultimate purchasers;

(3) the channels of trade in which the merchandise moves;

(4) the environment of the sale (e.g. the manner in which the merchandise is advertised and displayed);

(5) the usage of the merchandise;

(6) the economic practicality of so using the import; and

(7) the recognition in the trade of this use.

E.M. Chems., 20 CIT at 388 (citing *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373 (1976) (subsequent history omitted)).

Plaintiff asserts that "even if this subheading were being considered as a use provision, the class or kind of goods at issue is formulated beta-carotene, and this Court has already determined in the Lucarotin® decision that the principal use of beta-carotene is as a colorant." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Doc. No. 46 at 11 ("Plaintiff's Memo") (citing *BASF I*, 29 CIT at 685). Defendant counters that Betavits are "specially designed and intended to be used in making dietary supplements and nutritional tablets." Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Doc. No. 65 at 23 ("Defendant's Memo"). In determining whether Betavits are "commercially fungible" with either beta-carotene coloring matter or ingredients for dietary supplements, this court will consider multiple factors. *Primal Lite*, 182 F.3d at 1365; *see E.M. Chems.*, 20 CIT at 388 (citing *Carborundum*, 63 CCPA at 102).

As in *Roche Vitamins*,[2] the Defendant finds support for its argument in that "the manner in which the merchandise is advertised"

[2] Plaintiff likens Betavits to Lucarotin® 1%, the product at issue in *BASF I*, but also notes that "[t]he Betavit products are also similar in formulation to, and commercially interchangeable with, the Roche Vitamins BetaTab product before this court" in *Roche Vitamins*. Plaintiff's Memo at 4–5 n.1. *Roche Vitamins* is factually and legally similar to the current case before the court. In *Roche Vitamins*, the court denied Plaintiff's motion for summary judgment holding that "genuine issues of material fact affect the proper classification of Roche's imported merchandise." *Roche Vitamins*, 750 F. Supp. 2d at 1369. The court described the merchandise at issue in that case as follows:

> Beta-carotene is an organic colorant that has provitamin A activity. Beta-carotene must be combined with other ingredients to be used as a colorant or provitamin A. As explained by Roche's expert, the imported merchandise sold under the trade name BetaTab 20% is a reddish brown/orange powder that consists of 20% by weight synthetic beta-carotene crystalline . . . . BetaTab 20% was developed, designed, and marketed as a source of beta-carotene for purposes of sale to makers of dietary supplements (tablets and capsules) who seek a high beta-carotene/provitamin A content and antioxidant activity. The Roche marketing materials for BetaTab 20% do not mention any intent or use . . . as a food colorant. . . . Any colorant function in the actual use of BetaTab 20% is unintentional or ancillary.

and "the usage of the merchandise" indicate that Betavits have not been used for nor are marketed for use as a colorant, but only for use as a provitamin A in multivitamin tablets, capsules, and other vitamin products. *E.M. Chems.*, 20 CIT at 388 (citing *Carborundum*, 63 CCPA at 102); Plaintiff's Undisputed Facts ¶¶ 28–30; Defendant's Response to Plaintiff's Undisputed Facts ¶¶ 28–30.

With regards to Plaintiff's comparison to *BASF I*, a key distinguishing feature of *BASF I* is that the product at issue was "sold for use as a food colorant" and was "used to impart color to a wide variety of foods, including fruit drinks and other beverages, yellow cakes, bagels, and breads." *BASF I*, 29 CIT at 685. Indeed, at trial the court determined that "[c]ustomers do not buy Lucarotin® for any purpose other than delivery of a beta-carotene colorant." *Id.* Plaintiff argues that the court found, in *BASF I*, "as a matter of fact that beta-carotene is a substance used principally for coloration, a finding of fact left undisturbed by the Federal Circuit." Plaintiff's Memorandum of Law in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Doc. No. 72 at 5 ("Plaintiff's Reply"). The court instead found, *in that case*, that "[b]eta-carotene is a known food colorant and its primary use is as a colorant. In larger doses, beta-carotene can be a dietary supplement as an antioxidant." *BASF I*, 29 CIT at 686. The Federal Circuit, in turn, stated: "We note the concern of the *amici curiae* that if this formulation is denied access to the Pharmaceutical Appendix, other beta-carotene products may be wrongly classified. That concern is unfounded, for Lucarotin® 1% is unambiguously not imported as a vitamin product." *BASF II*, 482 F.3d a 1327 n.3.[3]

However, just as in *Roche Vitamins*, with regards to "general physical characteristics," *E.M. Chems.*, 20 CIT at 388 (citing *Carborundum*, 63 CCPA at 102), it is undisputed that Betavits can be used as a colorant. Plaintiff's Undisputed Facts ¶ 9; Defendant's Response to Plaintiff's Undisputed Facts ¶ 9.

Id. at 1369–70 (citations omitted). Roche sought classification of its merchandise under HTSUS subheading 3204, HTSUS subheading 2936, or as a provitamin under the Pharmaceutical Appendix. *Id.* at 1373. The court held that "as in *E.M. Chems.*, that material facts remain in dispute concerning the principal use analysis precludes summary judgment for classification under HTSUS Heading 3204," as well as under the other subheadings and the Pharmaceutical Appendix. *Id.* at 1378.

[3] In the present case, as Defendant points out, "BASF admitted that it had no knowledge or information that would indicate that the Betavit, in its condition as imported, was used as a food colorant, and BASF did not know of any use of these products as food colorants." Defendant's Memo at 5 (citing deposition of Lutz End, Doc. No. 65–5 at 22–23, 77–78).

Plaintiff has not satisfactorily applied the principal use factors to the classification of Betavits.[4] Defendant requests judgment in its favor in this matter but also states that because "summary judgment proceedings are not intended to resolve factual disputes, and recognizing that the 'principle use' issue was not clearly addressed by either party, the Court, in the alternative, may provide the parties with an opportunity, as it is doing in *Roche*, to conduct discovery on the class or kind and principal use." Defendant's Supplemental Memo at 3–4.

Plaintiff's Motion cannot be granted because of outstanding genuine issues of material fact as to whether Betavits belongs to the class or kind of goods principally used as coloring matter. *See* ARI 1(a), HTSUS (2002).[5]

2
Congressional Intent

Plaintiff also argues that whether Heading 3204 is a principal use provision is immaterial because congressional intent is clear as to the classification of beta-carotene; "[w]here Congress intends that the goods be classified under a heading, it is unnecessary to determine whether the provision is a use or *eo nomine* provision and labeling it either might 'generate, not eliminate, ambiguity contrary to Congressional intent.'" Plaintiff's Memo at 16 (citing *Esco Mfg. Co. v. United States*, 63 CCPA 71, 75, 530 F.2d 949 (1976); *De Laval Separator Co. v. United States*, 1 CIT 144, 148, 511 F. Supp. 810 (1981); *Steward-Warner Corp. v. United States ,* 6 CIT 302, 30405, 577 F. Supp. 25 (1983), *rev'd on other grounds ,*748 F.2d 663 (Fed. Cir. 1984)). Plaintiff argues that congressional intent "to classify all beta-carotene products in subheading 3204.19.35, regardless of their use as a colorant, a provitamin or an antioxidant" is "evident." *Id.* at 11–12. Plaintiff turns to the language of the HTSUS, ENs, and "the history of the classification of vitamins/provitamins in the U.S." to support this proposition. *Id.* at 11–17. Plaintiff summarizes:

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[4] Defendant briefly conducts an analysis of the *Carborundum* factors as applied in this case, arguing that "at least five out of seven factors (2–5 and 7) clearly support a finding that the merchandise fits within the class or kind of goods principally used as ingredients in dietary supplements. The other two factors (1 and 6) are somewhat ambiguous, but lend support to our position." Defendant's Memo at 24–25.

[5] Plaintiff tries to otherwise distinguish the present case from *Roche Vitamins*. For example, according to Plaintiff, information submitted concerning the "beadlet form issue" was not before the court in *Roche Vitamins*, and this information "establishes that the physical form of the Betavits is consistent with the physical form of merchandise within the class or kind of goods used as coloring matter." Plaintiff's Supplemental Memo at 3. The arguments asserted by Plaintiff are fact-intensive, contested, and suitable for trial; these arguments support rather than undermine the denial of summary judgment at this time.

> Congress enacted an *eo nomine* subheading for beta-carotene under a use heading covering synthetic organic coloring matter, and incorporated exclusionary note 2(f) to Chapter 29 to direct classification away from heading 2936 as a provitamin in favor of heading 3204 as a colorant. It then associated the "K" designator to 3204.19.35 so as not to deprive duty-free treatment to beta-carotene formulations used as a provitamin . . . . Therefore, the Betavits® are classified in subheading K3204.19.35 pursuant to the principal use of beta-carotene, which Congress has defined in the HTSUS to be as a colorant.

Plaintiff's Reply at 6. Plaintiff concludes "[t]he reading of these Chapter Notes and ENs result in the inescapable conclusion that while beta-carotene would normally be classified under 2936 as a duty-free provitamin . . . the drafters of the tariff have designated its primary use as coloration and so synthetic beta-carotene formulations must end up in 3204.19.35 whether used for coloration or as a provitamin." Plaintiff's Memo at 14–15.

Defendant asserts a different interpretation of the provisions at issue, arguing that "Heading 3204, in general, and subheading 3204.19.35, in particular, mandates that the product must be, at the very least, designed and used as colorants," based on the plain meaning of the term "coloring matter" found in the heading. Defendant's Memo at 16. Defendant supports this argument by turning to "the language and the design of the statute as a whole." *Id.* at 16–18. Defendant notes Heading 3204 for the purposes of this case encompasses "synthetic organic coloring matter, whether or not chemically defined" and that the court in *BASF I* "held that the plain meaning of 'coloring matter' in 3204.19.35 meant that 'products within the scope of the subheading would be beta-carotene or other carotenoid *colorants* of a particular kind or for a particular purpose.'" *Id.* at 15 (quoting *BASF I*, 29 CIT at 692) (emphasis in the original). Defendant contrasts Heading 3204 with Heading 2936 which encompasses "[p]rovitamins and vitamins, natural or reproduced by synthesis (including natural concentrates)" and argues that Heading 2936 is limited by Chapter 29 Note 2(f) which specifically excludes "synthetic organic coloring matter." *Id.* at 16. Defendant also points out the significance of the ENs to Heading 3204:

> The Explanatory Notes for Heading 3204 specifically list, at p. 454, a variety of carotenoids that are encompassed by that provision, including "β-carotene." . . . Explanatory Notes continue, at p. 455, that: Substances which in practice are not used

> for their dyeing properties are excluded (Chapter 29), *e.g.*, azulenes (heading 29.02); trinitrophenol (picric acid) and dinitroortho-cresol (heading 29.08); hexanitrodiphenylamine (heading 29.21); methyl orange (heading 29.27); acriflavine, bilirubin, biliverdin and porphyrins (heading 29.33).

Id. at 17–18 (emphasis removed).

It is not clear that Congress intended for all beta-carotene products to be classified as colorants. Plaintiff states that "[b]ecause the language of the HTSUS gives a roadmap of Congress' intent on classification of formulated beta-carotene, this Court must follow the basic tenet of statutory construction that a statute be construed to carry out the legislative intent of its drafters, and to determine this intent the plain meaning of the statutory language is paramount." Plaintiff's Memo at 16 (citing *Intercontinental Fibers, Inc. v. United States*, 64 CCPA 31, 33, C.A.D. 1179,545 F.2d. 744 (1976). However, Defendant offers a valid and alternate reading based on the plain meaning of the language and statutory construction: "To be classifiable in the 'beta-carotene' subheading, a good must first be coloring matter. Stated otherwise, a subheading cannot be used to expand the scope of a heading, and to be classifiable in a subheading, the goods must meet the criteria of the main heading." Defendant's Memo at 23 (citing *Carborundum*, 63 CCPA at 100–101).[6] "Unless it be shown that a literal construction leads to an anomaly or is contrary to Congressional intent . . . the statutory language must govern." *Intercontinental Fibers*, 64 CCPA at 33 (citation omitted).[7]

[6] As has been noted by the court previously, "*Carborundum* was decided prior to the introduction of the HTSUS. The case interpreted statutory provisions of the predecessor to the HTSUS-the Tariff Schedules of the United States ("TSUS") . . . . Decisions under the TSUS are not controlling on decisions made under the HTSUS, but TSUS decisions are instructive when interpreting similar HTSUS provisions." *BASF Corp. v. United States*, 30 CIT 227, 247 n.16, 427 F. Supp. 2d 1200 (2006) (citing *E.M. Chems.*, 20 CIT at 386 n.5). Here, the proposition put forth by Defendant, that "a subheading cannot be used to expand the scope of a heading, and to be classifiable in a subheading, the goods must meet the criteria of the main heading," references the General Interpretive Rule 10(c)(i) under the TSUS, a provision not found in the HTSUS, and is therefore perhaps persuasive but not controlling. Defendant's Memo at 23 (citing *Carborundum*, 63 CCPA at 100–101).

[7] Plaintiff relies on *BASF Wyandotte Corp. v. United States*, 855 F.2d 852 (Fed. Cir. 1988). Plaintiff is correct that the Federal Circuit stated "[w]hile the use of a product may be considered in determining the classification of that article . . . little weight should be placed on the industry using the item. The pertinent consideration is not who the user of the product is." Plaintiff's Memo at 17 (quoting *BASF Wyandotte*, 855 F.2d at 853–54). However, the Federal Circuit stated this proposition in response to arguments made by the government asserting that a product could be defined by the industry using it. *BASF Wyandotte*, 855 F.2d at 853–54. Here, the product is not being used by two different industries but

Additionally, Plaintiff's assertion of clear congressional intent is insufficient for the court to disregard its previous two holdings that "the term 'coloring matter' in Heading 3204 is a principle use provision" and that a principle use inquiry is therefore necessary. *Roche Vitamins*, 750 F. Supp. 2d at 1376 (discussing Roche's arguments as to the K designation) (quoting *E.M. Chems.*, 20 CIT at 387). "That determination was based on Heading 3204's language, Federal Circuit precedent, and EN 32.04." *Id.* The court has repeatedly held that the term "coloring matter" in Heading 3204 is a principal use provision and continues to do so. *Id.* at 1373 (denying summary judgment because of conflicting evidence as to the principal use of beta-carotene); *E.M. Chems.*, 20 CIT at 386 (denying summary judgment because of conflicting evidence as to the principal use of thermochromic liquid crystals). *See also BASF I*, 29 CIT at 684 (classifying beta-carotene product under subheading 3204.19.35, emphasizing the purpose of the product).

B
Classification Of The Betavits Under An Alternative Heading Also Depends On The Resolution Of Genuine Issues Of Material Fact

Plaintiff in the alternative moves for summary judgment to classify Betavits under either HTSUS Heading 2936 as a "provitamin," or HTSUS Heading 3003, which includes "medicaments." Plaintiff's Motion at 1.

In *Roche Vitamins*, the court extensively discussed the legal basis and factual disputes between the parties regarding classification as a provitamin under HTSUS Heading 2936, *Roche Vitamins*, 750 F. Supp. 2d at 1379–82, the key issue being whether the product's "ingredients 'render it particularly suitable for specific use'" versus "'general use,'" *id.* at 1382 (quoting Gen. EN 29.36(d)). The court need not revisit the same arguments here. Plaintiff tries to distinguish the present case by, for example, implying that the record as a whole, unlike in *Roche Vitamins*, contradicts Defendant's expert witness' assertions as to the particular suitability of Betavits for specific versus general use. Plaintiff's Supplemental Memo at 5. However, as noted above, the arguments asserted by Plaintiff are fact-intensive, contested, and suitable for trial; these arguments support rather than undermine the denial of summary judgment at this time. *See supra* n.7. As Defendant notes, "[a]lthough the details of the composition and manufacturing of BetaTab 20% differ from those of the Betavit products, and the parties' evidence is slightly different in the two

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rather might be used in two different ways. *See* Plaintiff's Undisputed Facts ¶ 28–30; Defendant's Response to Plaintiff's Undisputed Facts ¶ 28–30.

cases, the Court's finding that there is a material issue of fact whether the BetaTab ingredients render the product particularly suitable for specific use applies equally to the Betavit merchandise in *BASF*." Defendant's Supplemental Memo at 5–6.

Finally, Plaintiff briefly argues in the alternative that "if this Court finds that the Betavit® products do not fall within the scope of subheading 3204.19.35, then it could classify them as medicaments within the scope of 3003.90.00." Plaintiff's Memo at 20.[8] Quoting the language of Heading 3003.90.00, Plaintiff states that the "language of the heading refers to medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale." *Id.* at 21. Plaintiff also asserts that "[b]eta-carotene has a prophylactic use in preventing certain diseases including vitamin A deficiency disease and Betavit® 10% or 20% would be an efficient form of beta-carotene product to treat such a deficiency disease." *Id.*

Defendant, however, "[a]vers that beta-carotene preparations would not be used to treat vitamin A deficiency disease, as vitamin A itself would be used. There is no scientific evidence Betavit 20% or Betavit 10% has ever been used in the treatment of vitamin A deficiency disease. BASF does not market these products for this use." Defendant's Response to Plaintiff's Undisputed Facts ¶ 34. Defendant also asserts that BASF "has completely failed to demonstrate that Betavit is a product that is sold and used for its therapeutic or prophylactic properties." Defendant's Memo at 11. Defendant argues instead that "expert testimony from Dr. Russell shows that the Betavit is at best a dietary or nutritional supplement with no proven therapeutic or prophylactic properties." *Id.*[9] Defendant argues, therefore, that "Betavit is not encompassed by BASF's alternative claim for classification in subheading 3003.90.00, precisely because the plain terms of Heading 3003 mandate that the medicaments encompassed by that heading constitute products for therapeutic or prophylactic use." *Id.*

The court has previously found 3003.90.00 to be principal use provision. *Warner-Lambert Co. v. United States*, 28 CIT 939, 954, 341 F. Supp. 2d 1272 (2004) ("Before concluding that the Halls drop is a

[8] Because the Plaintiff in *Roche Vitamins* did not move for summary judgment under heading 3003.90.00, HTSUS, classifying the product as a medicament, the court did not address this heading. *See Roche Vitamins*, 750 F. Supp. 2d 1367.

[9] Specifically, and more limited than that asserted by Defendant, Dr. Russell stated "there is no credible scientific evidence of any therapeutic or prophylactic benefit of beta-carotene use as an antioxidant." Deposition of Robert Mitchell Russell, M.D., Doc. No. 65–1 at 8.

vehicle for vitamin C's therapeutic or prophylactic properties, however, it must have been proven that the product's principal use is for its vitamin C content and for the properties associated therewith."), *aff'd*, 425 F. 3d 1381, 1384 (Fed. Cir. 2005) ("While heading 3004 identifies the products it covers as 'medicaments,' it further limits the category to those products for specified uses. Heading 3004 thus is a 'use' classification, and according to the tariff schedules' 'Additional Rule of Interpretation' 1(a), 'the controlling use is the principal use.'") (citing *Primal Lite, Inc.*, 182 F.3d at 1363–64). Here, the Plaintiff has not "demonstrate[d] that Betavit is a product that is sold and used for its therapeutic or prophylactic properties." Defendant's Memo at 11.[10]

V
Conclusion

For the above stated reasons, Plaintiff's Motion for Summary Judgment is DENIED.[11]

Dated: October 19, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

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[10] The court in *Roche Vitamins* also rejected Plaintiff's argument that the duty-free rate under the Pharmaceutical Appendix affects the intended scope of Heading 3204. *Roche Vitamins*, 750 F. Supp. 2d at 1376–77. Plaintiff persuasively revisits this argument at length here, Plaintiff's Memo at 23–30; however, for the same reasons as in *Roche Vitamins*, Plaintiff's argument is also rejected in this case at this time. *Roche Vitamins* at 1378 ("Unless and until BetaTab 20% is classified under Heading 3204, these issues need not be resolved."); *see* Plaintiff's Memo at 23–30. For the same reasons, Defendant's requested alternate classification under HTSUS subheading 3204.19.40 is rejected at this time. *Roche Vitamins* at 1378 ("Roche's claim for duty-free entry under the [Pharmaceutical Appendix] and Defendant's requested alternate classification under HTSUS subheading 3204.19.40 both depend on BetaTab 20% first being classified under Heading 3204."); *see* Defendant's Memo at 2.

[11] Oral argument was held on September 20, 2011. At the close of proceedings, the court by minute order GRANTED Plaintiff's application to reopen discovery. Discovery is reopened until January 17, 2012 for the limited purpose of classifying Betavits under Heading 3204 pursuant to ARI 1(a).